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IN THE

Supreme Court of the United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents

Petition for a Writ of Certiorari to the New York State Court of Appeals

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Questions Presented

After finding that the loss of the 52,000 units of single room occupancy ("SRO") housing that still exist in New York City would substantially contribute to homelessness, the New York City Council enacted an emergency statute. The law imposes a five year ban on demolition or conversion of single room occupancy housing and a five year ban on the warehousing of vacant rooms. It also contains a hardship provision which ensures that owners will make a reasonable rate of return on their property. The following questions are presented:

1. Does the statute result in a physical occupation of the subject properties violative of the Taking Clause of the Fifth Amendment?
2. Is the statute invalid on its face as a regulatory taking of property?

Parties

Petitioners, the defendants below, are the City of New York, Edward I. Koch in his capacity as Mayor of the City of New York, Abraham Biderman in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York¹ and Charles Smith in his capacity as Commissioner of the Department of Buildings of the City of New York.

Also petitioners, but not joining this petition for certiorari, are the Coalition for the Homeless and five individuals, Richard Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo and Nicholas Tallerico, who are tenants in two of the SRO buildings owned by plaintiff Seawall Associates. The Coalition and the five tenants intervened as defendants below.

Respondents, plaintiffs below, are Seawall Associates, 459 West 43rd Street Corporation, Eastern Pork Products Company, Durst Partners, Sutton East Associates—86, Channel Club and Anbe Realty Co.

¹Former Commissioner Paul Crotty was originally named in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

**Petition for a Writ of Certiorari to the New York State
Court of Appeals**

The petitioners, the City of New York, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the New York State Court of Appeals entered on July 6, 1989 which declared unconstitutional a statute enacted by the New York City Council.

Opinions Below

The opinion of the New York State Court of Appeals has not yet been reported. It is reprinted in the Appendix at page A-1. The opinion of the New York State Supreme Court, Appellate Division, First Department is reported at 142 A.D.2d 72, 534 N.Y.S.2d 958. A copy is reprinted in the Appendix at page A-107. The New York State Supreme Court opinion is reported at 138 Misc.2d 96, 523 N.Y.S.2d 353. A copy is reprinted in the Appendix at page A-165.

Jurisdiction

The judgment of the New York State Court of Appeals declaring New York City's Local Law 9 unconstitutional on the ground that it takes property without compensation in violation of the Fifth Amendment was entered on July 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

Statutory Provisions

Local Law 9 is codified in New York City Administrative Code §§ 27-198.2, 27-198.3, 27-2150-53. The law is printed in the Appendix at page A-253.

Statement of the Case

(1)

This appeal raises the question whether New York City's Local Law 9, which bars demolition or conversion of single room occupancy ("SRO")¹ housing and forbids the warehousing of vacant units for a five year period, constitutes a taking on its face under the Fifth Amendment. Local Law 9 was enacted after the New York City Council found that the loss of SRO housing constituted "a serious public emergency" (42).²

SRO's have long provided inexpensive housing for New York City residents on the fringe of society. SRO tenants are poor. Those who work full time have a median income

¹SRO's are living units without a private bathroom or kitchen (176).

²Numbers in parentheses refer to the Record on Appeal filed in the Court of Appeals. Numbers preceded by "SR" refer to the Supplemental Record in the Court of Appeals. Numbers preceded by "A" refer to the Appendix to the Petition for Certiorari.

of \$14,000. One third of SRO tenants receive public assistance or disability benefits (177). Many have other problems fending for themselves. Almost 30% are over 60 years old (177). Over 11% have been hospitalized for mental illness (SR 594).

SRO's have been developed in New York City since the turn of the century. Landlords have found them a profitable way to break up larger units and earn more rent from the same space. They used SRO's to attract poor tenants who could not afford better housing (684-85).

The number of SRO's has declined significantly since 1960 due to the rise in value of New York City real estate (692). Many landlords neglected their buildings and harassed tenants to force them to move so that the buildings could be razed or converted to other uses (221, 668). City policy reflected the belief that SRO's should be discouraged as substandard housing (177). By 1986, only 52,000 SRO units remained in New York City (447).

City policy changed in the 1980's to recognize that SRO's are a vital and irreplaceable part of the housing stock. The City acted to preserve SRO's because many of the former SRO tenants became homeless. New York City is facing a homeless crisis; the City takes in more homeless people at its public shelters than at any time since the Great Depression (178-79). More than one-third of the people living in New York City shelters for the homeless last lived in an SRO (200).

In 1985, the New York City Council determined that a "serious public emergency" existed caused by the loss of SRO's. It enacted the first of three laws barring destruction or alteration of SRO's and commissioned a study of SRO housing. The second law added a ban on warehousing

vacant units because many owners were keeping units vacant in anticipation of a future conversion or demolition (178). The vacancy rate for SRO's, 12%, stood in sharp contrast to the 2% vacancy rate for residential apartment buildings (178).

The SRO study ("the Blackburn Report") recommended a major effort by the City to preserve SRO housing (647). The Blackburn Report's 140 pages detail the history of SRO's in New York City, analyze the need for SRO housing and the current condition of SRO owners and tenants, and contain extensive recommendations for preservation of SRO's. In response, the City Council enacted Local Law 9. The law was based on findings of fact by the City Council (A-315-17):

The Council finds and declares that a serious public emergency . . . has been created by the loss of single room occupancy dwelling units housing lower income persons; . . . that there is evidence to conclude that the ordinary operation of the real estate market in this city will result in further reduction of such units and that units which have been lost will not be replaced; that many of the occupants who have been or will be displaced . . . are elderly and infirm persons of low income . . . that a considerable number of such persons have become a part of a growing homeless population and that, absent legislative intervention in this process, others will follow.

(2)

Local Law 9

Local Law 9 preserves SRO housing while allowing owners to put their SRO's to other uses, as long as the lost

units will be replaced. The law establishes a five year moratorium on demolition or conversion of most SRO units. Admin. Code §27-198.2[a], [c]. SRO's subject to the law may not be warehoused; owners must make all SRO's habitable and rent them to bona fide tenants. Admin. Code §27-2151[a]. These provisions carry civil penalties. Admin. Code §27-198.2[g], §27-2152.

The law establishes three ways for owners who would otherwise be subject to the law to demolish or convert their buildings and avoid the anti-warehousing provisions. Owners may be eligible for a complete or partial hardship exemption, they may buy out their units or they may replace their units.

The hardship provision, Admin. Code §27-198.2[d][4] (b), was copied from the New York rent control law. It applies if "there is no reasonable possibility" owners will make "a reasonable rate of return" on their property. Reasonable rate of return is defined as 8 1/2% of the building's assessed value as an SRO. Owners who qualify under the hardship provision and wish to destroy or convert their buildings may do so with a complete or partial exemption from the buy out or replacement provisions.

The replacement provision, Admin. Code §27-198.2[d] [4](a)(ii), allows owners to obtain a permit to demolish or convert SRO units if they create new units. The replacement units would be owned or operated by a not-for-profit corporation.

As an alternative, owners can pay \$45,000 a unit to the SRO housing development fund company. Admin. Code §§27-198.2[d][4](a)(i), 27-198.2[h]. The money will be used to preserve, acquire and develop low and moderate

income housing (182). \$45,000 represents the cost of acquiring and rehabilitating an existing SRO unit (182).

Tenants whose buildings may be converted or demolished are protected by the law. If a building is more than 50% occupied, replacement housing must be created. In this way, even a temporary reduction in the housing stock can be avoided. The law also requires owners seeking a replacement or buy out exemption to offer their tenants an opportunity to relocate to a comparable unit at a comparable rent in the same borough. Admin. Code §27-198.3.

(3)

Proceedings Before the Trial Court

In *Seawall Associates v. City of New York*, the plaintiffs sought a preliminary injunction against enforcement of Local Law 9. They argued, among other things, that Local Law 9 was invalid as a taking under the Fifth Amendment (17-34).

Without notice to the parties, the trial court converted the motion for a preliminary injunction into a motion for summary judgment (A-182). The Court granted the plaintiffs summary judgment, declared Local Law 9 invalid and enjoined enforcement of the law (A-250-51).

The Court reasoned that the law effected a taking because it diminished the value of SRO properties (A-243). The Court also held that the anti-warehousing provisions denied plaintiffs due process because they destroyed the properties' economic value (A-219-20, SR 542).

The Appellate Division Decision

Citing the principles set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 420 (1987); *Agins v. Tiburon*, 442 U.S. 255 (1980); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Appellate Division unanimously declared Local Law 9 constitutional in its entirety (A-158). The Court found that the law substantially advanced a legitimate state interest in preventing SRO-tenants from becoming homeless (A-143-44, 152). The Court referred to the Blackburn Report, which had recommended that the City preserve SRO's because SRO's house a predominantly poor population, who are frequently elderly and mentally or physically handicapped with limited incomes (A-152). The Appellate Division also upheld the validity of the anti-warehousing provision of the law because it is "designed to meet an immediate and pressing exigency" even if its effect will be to require that a property owner remain in the housing business (A-155).

The Court found that Local Law 9 did not deny plaintiffs economically viable use of their property because its hardship provision ensures that their properties retain value. The Court held that the law did not work a taking merely because it restricted owners from making the most profitable use of their property (A-149-51).

The Court of Appeals Decision

The Court of Appeals reversed, declaring Local Law 9 unconstitutional on the ground that it takes property in violation of the Fifth Amendment. Focusing on the anti-warehousing provision, the Court found, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that the law constituted a physical taking of property because it deprived owners of the right to exclude others (A-13-14). In so holding, the Court noted that "the Supreme Court has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a *per se* physical taking" (A-21). The Court distinguished decisions of the Supreme Court and the New York Court of Appeals which have consistently upheld rent control statutes on the ground that the decisions do not involve forcing property owners to rent their properties to strangers (A-23-26).

The Court stated that the law also effected a regulatory taking. The Court found that the law deprived owners of economically viable use of their property because it prohibited owners from redeveloping their properties (A-33-39). The Court also found that the law lacked a substantial relationship to the purpose of preventing homelessness (A-44-52).

In dissent, Judge Bellacosa and Chief Judge Wachtler criticized the majority for ignoring the fact that this was a facial challenge to the law. The dissent argued, relying on this Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), that a statute should not be struck down as facially unconstitutional although it may deprive some

owners of economically viable use of their property (A-84-86). It noted that (A-71-72):

Research reveals no cases in which the Supreme Court or our Court have used the regulatory taking theory to undo a legislative act on a facial attack. Also, no precedents in the orbit of this case have previously ventured into the *per se* taking universe to declare a legislative act facially unconstitutional.

The dissent rejected the physical taking argument because the law was temporary and because it was similar to rent control in regulating the landlord-tenant relationship (A-91-92). The dissenters also rejected the regulatory taking theory. They would find that the law's hardship provision "guarantees a fair, minimum return" (A-98). The dissent reviewed the history of the City's policy toward SRO's and its effect on the stock of affordable housing (A-74-75). It found "self-evident" the established relationship between the law and its purpose of preventing more homelessness among SRO tenants (A-96-97):

[P]reserving SRO housing stock and stanching the growing ranks of the City's shelter-less population is a legitimate governmental interest of the highest, most critical order. The SRO moratorium applies a tourniquet to the loss of this part of the City's housing stock and substantially advances the City Council's expressed legislative interest of preserving these sheltering units and avoiding a further spillage of homeless into the City's street population.

Reasons for Granting the Writ

This case raises important questions regarding a municipality's ability to regulate land use to halt the spread of homelessness among its poorer citizens without effecting a taking of property. As the dissent in the Court of Appeals pointedly noted, the majority's decision that New York City's Local Law 9 constitutes a physical taking is without precedent. On both the physical taking and regulatory taking grounds, the decision below is inconsistent with this Court's decisions on land use regulation. Finally, the Court of Appeals erred in sustaining a facial attack to the statute without having any facts in the record to support a conclusion that any property owner had been unfairly affected and had been unable to obtain relief under the statute's hardship provision.

This Court has jurisdiction to hear this case because, as is discussed *infra* at 22, the Court of Appeals majority did not rest its decision on an adequate and independent state ground. See *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). The majority opinion held, based on a misreading of federal constitutional law, that Local Law 9 constitutes a taking of property in violation of the Fifth Amendment.

1. The Majority's Extraordinary Extension Of The Physical Taking Doctrine To Include A Temporary Law Regulating The Landlord-Tenant Relationship Is Without Support In This Court's Cases.

The majority's application of the physical taking doctrine to a law regulating the landlord-tenant relationship is unprecedented. This Court has never found that a law that prevents landlords from excluding residential tenants from rental units constitutes a physical taking.

The majority below held that Local Law 9 effects a physical taking because the anti-warehousing provision, when applied to vacant units, requires creation of a tenancy (A-21). In so ruling, the Court of Appeals ignored this Court's repeated adherence to the rule that landlord-tenant regulations do not effect a taking *per se*. In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1989), this Court reaffirmed that such statutes are a proper exercise of the police powers:

We stated in *Loretto v. Teleprompter Manhattan CATV Corp.* that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." And in *FCC v. Florida Power Corp.* we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." 108 S. Ct. at 857 n.6 (citations omitted).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), this Court held that a "permanent physical occupation" of land is *per se* a taking. This Court has declined, however, to find that laws regulating tenancies constitute a "permanent physical occupation." See *Pennell*, 108 S. Ct. at 857 n. 5 (1989) (challenge to rent control law as a physical taking rejected as not ripe). Indeed, this Court has repeatedly reaffirmed the validity of laws that restrict landlords' ability to determine whether their residential properties will be rented. See *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding rent control); *Block v. Hirsh*, 256 U.S. 135 (1921) (same); *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, 464 U.S. 875 (1983) (upholding rent control statute that effectively eliminates right to evict

tenant); *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981) (same).

Under rent control, as with Local Law 9, owners lose their right to exclude others from their properties. Owners give up the right to eliminate an existing tenancy, even at the end of a lease, thus eliminating the owners' right to exclude the tenants from the building. See, e.g., *Benson v. Beame*; *Callahan v. Fresh Pond Shopping Center, Inc.*

Moreover, the practical effect of rent control is to require the creation of new tenancies when existing tenants die or move out. Landlords who cannot afford to maintain a building without rental income will not be able to obtain permission to raise rents for existing tenants if rentable units are vacant because the landlord chooses to keep them off the market. See New York City Administrative Code §26-511 [c] (6). Thus, rent control statutes require that properties be occupied without effecting a physical taking of the property.

Even if this Court had not established that laws regulating landlords and tenants do not constitute a taking, the anti-warehousing provisions would be constitutional. In *Loretto* this Court held that a law requiring owners to allow cable companies to install cable equipment on their rental buildings constituted a physical taking. Yet this Court carefully hypothesized and distinguished a law similar to Local Law 9. A law requiring landlords to install cable television for their tenants would not necessarily constitute a physical taking, this Court stated, even though the landlord would have to bring cable apparatus into the building. The fact that the landlord would own, select and install the cable was sufficient to take it out of the realm of a physical taking. *Loretto*, 458 U. S. at 440 n.19.

The anti-warehousing provision at issue here is similar to the law hypothesized in *Loretto*. The law does not appropriate the SRO units. It requires, instead, that owners rent out their units to any bona fide tenant. Because owners retain the right to choose their tenants, there is no physical taking. See also *Loretto v. Teleprompter CATV*, 53 N.Y.2d 124, 159 n.2, 423 N.E.2d 320, 338 n.2 (1981) (Cooke., C.J., dissenting).

The Court of 'Appeals' application of the doctrine of physical taking to Local Law 9 was also unwarranted because the law is not permanent. As this Court explained in *Loretto*, a physical taking is a permanent taking: "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Loretto*, 458 U. S. at 435 n.12.

Local Law 9 provides for a five year limit on its restrictions. The law can be extended for further five year periods only if the New York City Council finds that the "serious public emergency" that led to enactment of the law continues to exist (A-312 §7).

The Court of Appeals accepted that the law is temporary (A-27), but mistakenly read this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as holding that physical takings could be temporary. This expansion of the doctrine of physical taking is unwarranted.

In *First Lutheran Church*, this Court held that damages could be assessed if a regulatory taking occurred. This Court did not hold that a physical taking could be temporary. *First Lutheran Church* did not even involve a physical taking. 482 U.S. at 310. Thus, *First Lutheran Church* did not extend the notion of a temporary taking to a physical

taking which this Court has defined, in part, by the permanence of the physical occupation. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987); *Loretto*, 458 U.S. at 427-35.

Finally, the Court below had no basis for its holding that the provisions of Local Law 9 that bar demolition or conversion of SRO housing effect a physical occupation of property. In the absence of a physical entry, there cannot be a "physical occupation." *See Nollan*, 483 U.S. at 831-32; *Loretto*, 458 U.S. at 435-36; *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

In sum, the majority's application of the doctrine of physical taking to Local Law 9 had no basis in this Court's cases. Because the law is similar to rent control in regulating landlord-tenant relationships and because it is temporary in duration, it does not effect a physical taking.

2. The Majority Opinion Disregarded This Court's Standard For Determining When A Statute Effects A Regulatory Taking On Its Face.

To succeed in a facial challenge to a law's constitutionality, the plaintiffs must show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The majority below ignored this standard and held that because some aspects of Local Law 9 are improper in some circumstances, the law is facially invalid. The majority's application of an overbreadth analysis has no basis in takings cases.

Moreover, the majority ignored this Court's warning that facial takings challenges are especially disfavored. *See Pennell*, 108 S. Ct. at 856-57; *Keystone Bituminous Coal Ass'n*

v. *DeBenedictis*, 480 U.S. 470, 494 (1987). In *Pennell* this Court explained:

Given the “essentially ad hoc, factual inquir[y]” involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that “the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary” (citations omitted) 108 S. Ct. at 856.

The Court of Appeals deemed Local Law 9 improper in all circumstances without ever engaging in the “essentially *ad hoc* factual inquiry” that determines a takings analysis.

This Court has held that a statute “does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987); *Keystone*, 480 U.S. at 485. Local Law 9 satisfies these tests on its face.

Local Law 9 contains a hardship standard that ensures the properties it regulates remain economically viable. The law provides that if owners cannot earn 8 1/2% on their buildings’ assessed value as an SRO, they are exempted from all portions of the law, including the anti-warehousing provisions. Administrative Code §§27-198.2[d][4](b), 27-2151[b][3]. The hardship standard ensures that all regulated properties have at least one economically productive use—the use they have always been put to as an SRO. This hardship standard was derived from the New York rent control law, which has been sustained against constitutional challenge. *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

If an SRO owner anticipates that the law will eliminate his or her property's economic viability, the owner may apply for a hardship exemption, just as an owner may apply for hardship relief from a myriad of land use restrictions including zoning regulations, rent control and New York City's Landmarks Law. Owners dissatisfied with the administrative process may challenge the law as applied to their property. A reviewing court can then analyze the owner's "reasonable investment backed expectations" and perform the "essentially *ad hoc* factual" inquiry into such factors as how much an owner paid for the property and with what expectations. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).³

This Court has never held, however, that a law may be struck down as facially invalid because it may effect a taking as applied to some owners. To the contrary, as long as it is constitutional to apply the law to some owners, the law is facially valid. *See Salerno*, 481 U.S. at 745. Thus, for example, in *Keystone* this Court needed to look no further than the plaintiffs' own properties to determine that the law did not deprive all owners of economically viable use of their property. 480 U.S. at 496.

Instead of analyzing whether regulated SRO's retain economic value, the majority struck down the law because it depresses the value of SRO's (A-36). It is well established

³If plaintiffs challenged the law as applied to them, petitioners could dispute the majority's view that Local Law 9 effects a taking as applied to owners who intend to develop their property (A-30). For instance, Seawall plans to assemble a city block in midtown Manhattan to build an office building (276). Because the trial court granted summary judgment without notice, petitioners never had the opportunity to offer evidence tending to show that Seawall's property will retain economic value, and indeed Seawall will still be able to make a profit, after complying with the law's replacement or buy out provisions.

that a mere diminution in the value of property is insufficient to prove a taking. *Penn Central*, 438 U.S. at 131; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution in value). Instead, the issue is whether SRO properties retain economic viability, a question that can best be resolved in a challenge to the law as applied to particular properties. See *Pennell*, 108 S. Ct. at 856.

The majority's misconception of this Court's standard for determining whether a statute effects a taking is exemplified by its decision to analyze whether the hardship provision saves a statute it had already determined to be unconstitutional (A-53). In performing a taking analysis, this Court has always analyzed statutes as a whole. For instance, in *Penn Central* this Court considered the availability of hardship relief as part of determining whether the Landmarks Law left the regulated property economically viable. 438 U.S. at 136-38. This Court has never analyzed a law by isolating particular requirements, determining whether they effect a taking and then asking whether the taking had been sufficiently mitigated by another provision. The majority's approach is inconsistent with this Court's takings cases.

3. The Majority Opinion Ignored This Court's Decisions That Have Upheld Land Use Regulations Similar To Local Law 9.

The majority held that the law denied owners economically viable use of their property because it eliminates the right to develop SRO's (A-35). This was factually inaccurate; the law's replacement and buy out provisions enable owners to develop their properties while alleviating the harm their development does to the people of New York City.

Even if the law banned development, however, it would not mean that Local Law 9 effects a taking. A law may limit how property is used without taking property. See *Keystone*, 480 U.S. at 491 (ban on mining coal support estate); *Goldblatt v. Hempstead*, 369 U. S. 590, 592 (1962) (ban on using gravel pit as quarry). Indeed, ordinary zoning would hardly be possible if this were not the case. Land zoned for single family homes may not be developed for other uses. It has been settled as long ago as *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that this type of development ban does not effect a taking, even if the owner had bought the land with the intention of putting it to a more lucrative use.

This Court reaffirmed in *Nollan v. California Coastal Comm'n* that as long as a land use regulation substantially advances a legitimate state interest, owners may be barred from changing the use of their property. 483 U.S. at 835-37. Thus, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130.

The majority's theory that because Local Law 9 imposes an affirmative duty it effects a taking (A-58), also ignores this Court's decisions. The Landmarks Law at issue in *Penn Central* imposes the affirmative duty on owners to keep their building "in good repair." See *Penn Central*, 438 U. S. at 111-12. Moreover, laws governing the landlord-tenant relationship frequently impose affirmative duties on property owners. As this Court stated in *Loretto*, such laws do not effect a taking merely because they impose particular requirements. 458 U. S. at 440.

The majority relied on this Court's observation that the Takings Clause was "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49 (1960) (A-60). But a takings analysis does not merely compare the regulated group to some other group. The narrowness of the burdened class is not enough to establish a violation of the Takings Clause: "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received." *Keystone*, 480 U.S. at 491 n.21.

In *Penn Central* this Court rejected the rationale relied on by the Court of Appeals. "It is, of course, true that the Landmarks Law has a more severe impact on some land-owners than on others, but that in itself does not mean the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133.

As long as owners benefit under the law, they have not been singled out. In *Penn Central*, this Court accepted the City Council's judgment that the owners of 400 official landmarks, out of the over one million buildings in New York City, would benefit because the law "benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . ." *Penn Central*, 438 U. S. at 134.

SRO owners are similarly benefited as New Yorkers by Local Law 9. The City Council has made a judgment that the law will help everyone in New York City by halting the growth of a "serious public emergency" caused by the loss of SRO housing. By ending the increase in homelessness attributable to the loss of SRO's, the law will improve "the quality of life in the city as a whole." *Penn Central*, 438 U. S. at 134.

4. The Majority Opinion Disregarded The Considered Legislative Judgment That Local Law 9 Is Necessary To Prevent Homelessness And To Put Available Housing To Use.

The majority's analysis of the purpose of the law was similarly deficient. In *Nollan* this Court held that a land use regulation must "substantially advance" a "legitimate state interest." 483 U.S. at 834. Local Law 9 satisfies this standard.

Local Law 9 was enacted after the Blackburn study confirmed that it was necessary to solve a "serious public emergency" (A-315). The majority below ignored the Council's stated reasons for its actions and substituted its judgment of the law's utility for that of the legislative body. This judicial legislation was improper.

The City Council's statement of legislative findings details two purposes. For the 88% of SRO's that are occupied (178), the purpose of the law is to prevent current SRO tenants from becoming homeless (A-316). For the 12% of vacant SRO units, the purpose of the law is to ensure that solely needed housing is made available (149). The replacement and buy out provisions allow owners to put their properties to other uses, as long as they mitigate the harm caused to the public by their destruction of SRO housing.

The law substantially advances both legitimate state interests in preservation of SRO housing. The ban on warehousing, demolishing or converting SRO's will save current tenants from homelessness. Through bitter experience, New York City has learned that when owners empty SRO's in order to redevelop their properties, many of the former tenants end up without a home (177-78). SRO tenants are poor; many are elderly, many are mentally ill

(177, SR 594). Even if owners use legal means to empty their buildings, SRO tenants have proven incapable of resisting their landlords' pressure to move and, once they have left their homes, incapable of finding another.

The five year ban on demolition or conversion of SRO housing helps preserve the buildings. The five year ban on warehousing vacant units ensures that landlords will not empty their buildings and wait out the moratorium, thus subverting the purpose of the law.

The majority opined that rent control was sufficient to protect existing SRO tenants (A-48). Local Law 9 was enacted because the City Council found that rent control was insufficient to protect SRO tenants from homelessness (A-316-17). This Court has recognized that the rise of homelessness justifies measures that go beyond traditional rent control to serve rent control's purpose of making affordable housing available. Thus, in *Pennell* this Court upheld a statute that set rents in part by reference to the tenant's ability to pay. The law was proper, this Court stated, because "[p]articularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe." 108 S. Ct. 859 n.8. In enacting Local Law 9, the New York City Council was all too aware of the severe social costs of dislocating SRO tenants. Local Law 9 ensures that SRO tenants will not be added to the ranks of the homeless.

The majority was also wrong when it held that the ban on warehousing currently vacant units does not further the law's purpose (A-49). As the City Council stated, this aspect of the law will "maintain the availability of single room occupancy dwelling units for low income persons during the serious public emergency [caused by the loss of SRO housing]" (149). Further, when anti-warehousing is

applied to partially occupied buildings, it protects existing tenancies by ensuring the building remains viable as housing. Thus, anti-warehousing as applied to vacant units substantially advances the Council's two purposes of making a vital resource available and protecting existing SRO tenants. The second guessing of the Council by the majority below was unjustified and has no support in this Court's decisions.

5. This Court Has Jurisdiction To Hear This Case.

The Court of Appeals' decision does not rest on an adequate and independent state ground. In *Michigan v. Long* this Court held:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. 463 U.S. at 1040-1041.

The *Michigan v. Long* holding is implicated in the case at bar. The Court of Appeals' decision is based on an extensive analysis of the federal constitutional law of takings as developed in this Court's decisions. The Court of Appeals refers to a state constitutional ground only in three instances and only in conjunction with the federal constitution (A-3, 12, 63).

Furthermore, the Court of Appeals did not include a "plain statement" that federal law did not compel its result. See *Michigan v. Long*, 463 U. S. at 1041; *New York v. Class*,

475 U. S. 106, 109-110 (1986). Indeed, the Court below expressly stated that it would not reach the question of whether the state constitution's takings clause differed from that of the federal constitution: "In view of this holding, we need not decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution" (A-63 n. 15). Thus, the Court below rested its decision on its interpretation of the federal takings clause. Therefore, this Court has jurisdiction to hear this appeal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ELIZABETH DVORKIN,
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89-388

No. 88

Supreme Court, U.S.

FILED

SEP 5 1989

JOSEPH F. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

SEAWALL ASSOCIATES, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE NEW YORK STATE
COURT OF APPEALS

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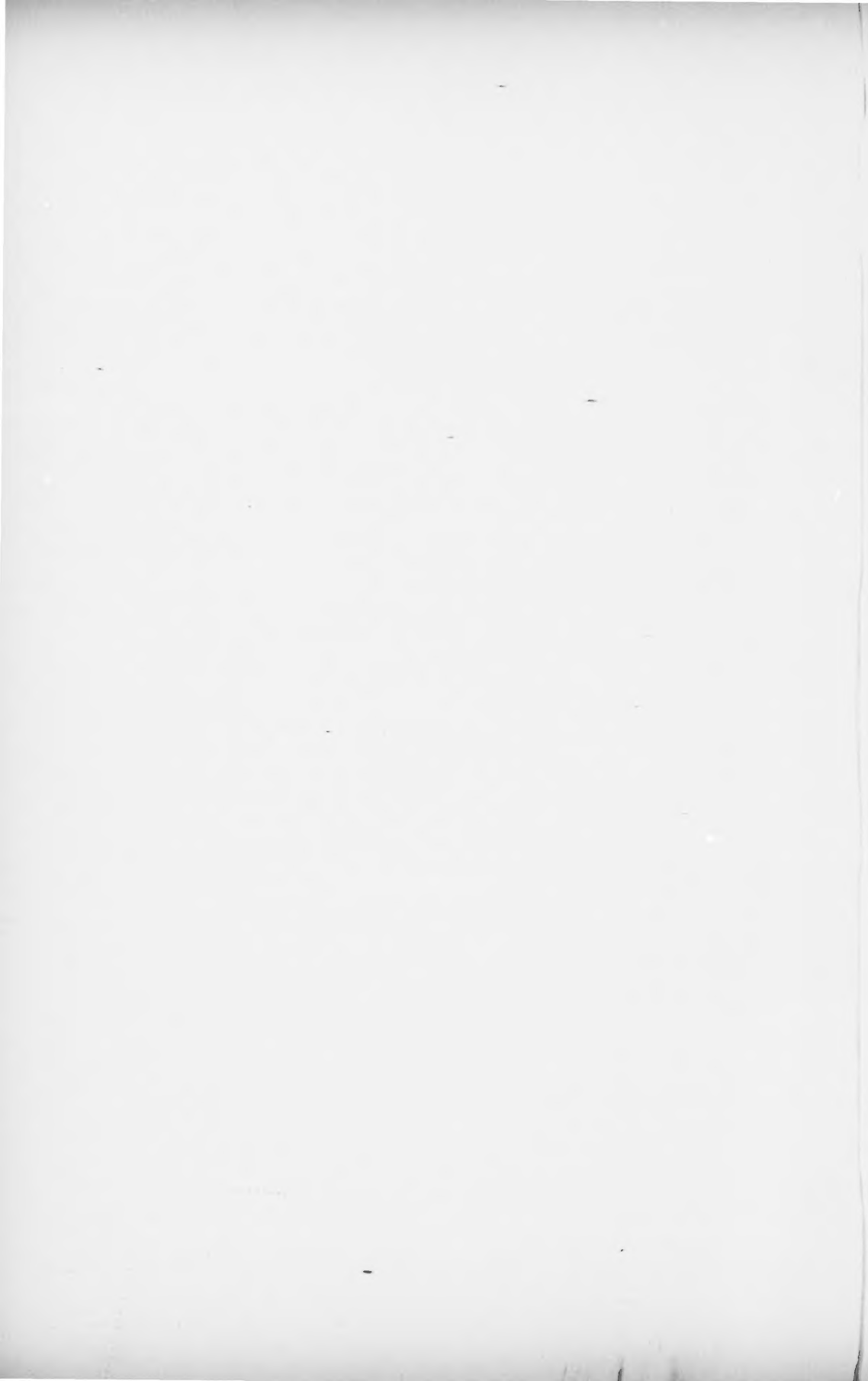
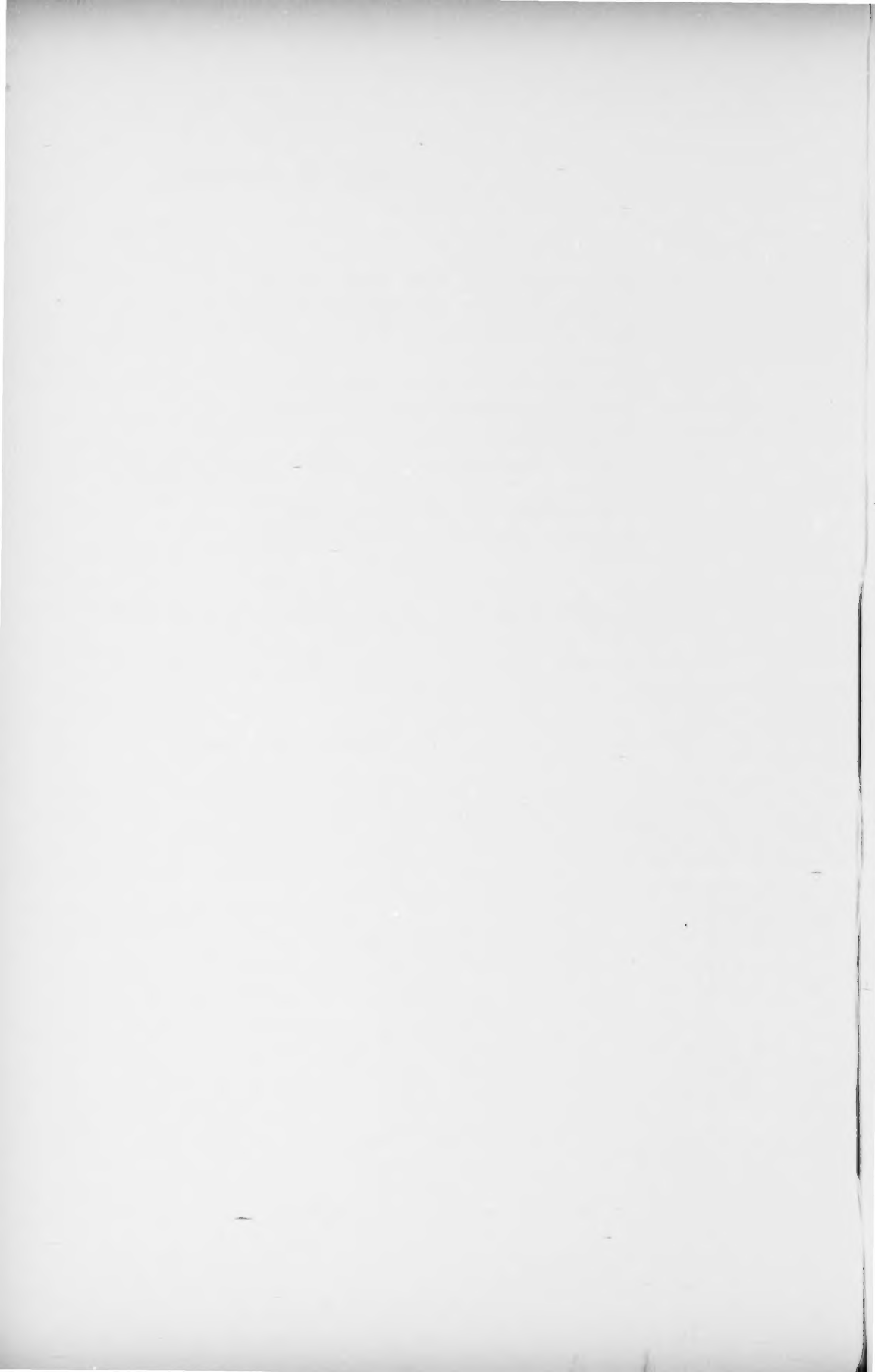


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DECISION OF THE NEW YORK STATE
COURT OF APPEALS, DATED JULY 6,
1989.

Seawall Associates, et al.,

Appellants,

v.

The City of New York, et al.,

Respondents,

Richard Wilkerson, et al.,

Intervenors-Respondents,

(and two other actions.)

OPINION

This opinion is uncorrected and
subject to revision before
publication in the New York
Reports.

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HANCOCK, JR., J.

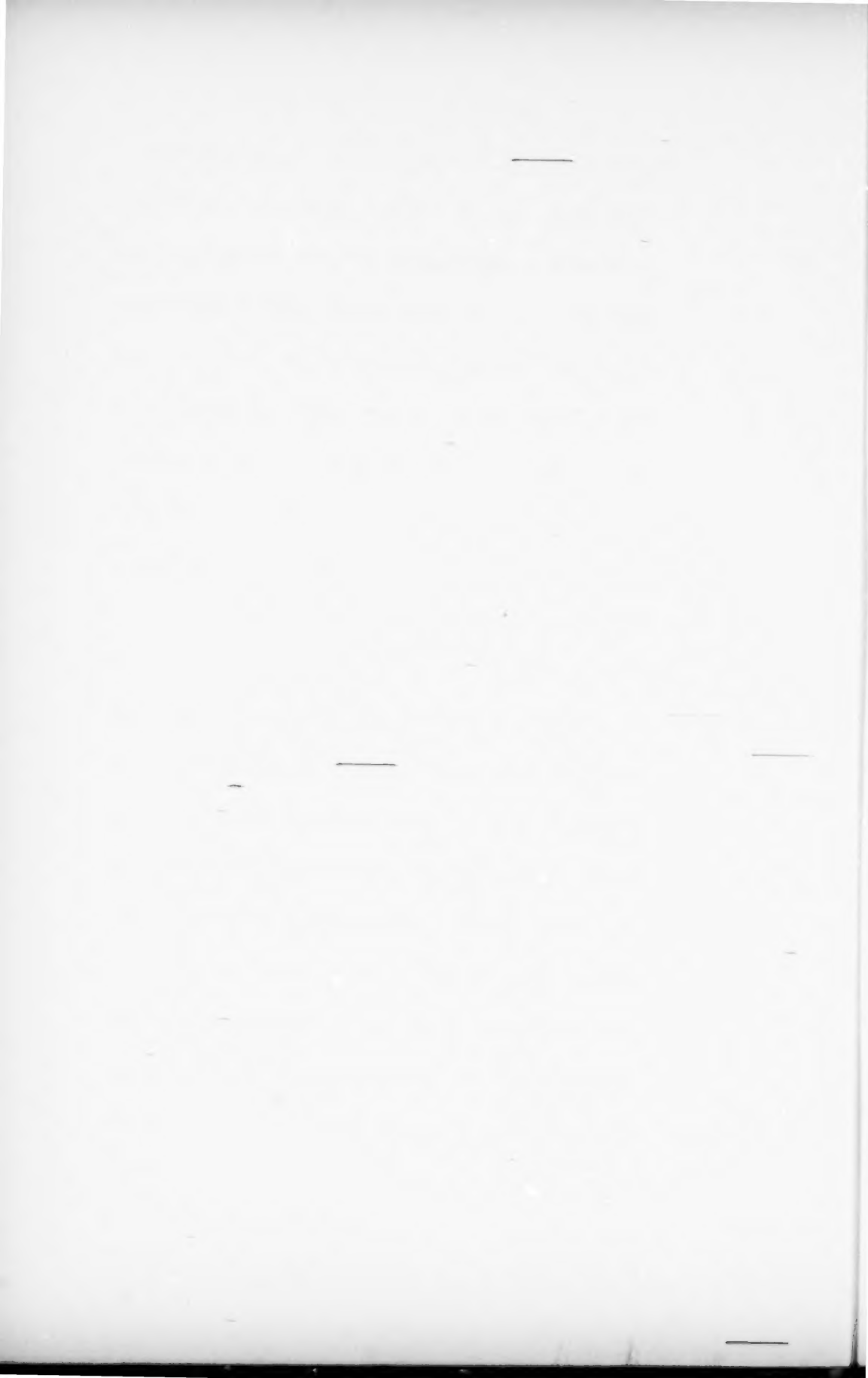
Local Law No. 9 prohibits the
demolition, alteration, or
conversion of single room occupancy
(SRO) properties and obligates the
owners to restore all units to
habitable condition and lease them
at controlled rents for an
indefinite period. Plaintiffs,
real estate developers who own SRO
properties, challenge the law as an
unconstitutional taking of private
property without just compensation.
Defendants, the City of New York



and various officials, contend that the law is a valid effort to help prevent homelessness by preserving the stock of low-rent SRO housing. In our view, Local Law No. 9 is facially invalid as both a physical and regulatory taking in violation of the federal and state constitutions and we, therefore, declare it null and void.

I

After years of encouraging the demolition and redevelopment of SRO properties -- which the City of New York considered substandard housing -- the City abandoned its policy when it found that the stock of low-cost rental housing was shrinking at an alarming rate (see, Blackburn, Single Room Occupancy in



New York City at 1-4 to 1-7)¹ On August 5, 1985, the City enacted Local Law No. 59 which imposed an 18-month moratorium on the demolition or conversion of structures containing SRO units. Thereafter, Local No. 22 was enacted to extend the moratorium through the end of 1986. Local Law No. 22 added the requirement that owners of SRO properties rehabilitate all vacant units and offer them for rent, and it provided for substantial monetary penalties for noncompliance.

¹Local Law No. 59, a predecessor of Local Law No. 9, mandated a study of SRO housing in New York City by Urban Systems Research and Company. The report, written by Anthony Blackburn, was issued in February 1986 and recommended efforts by the City to preserve SRO units.

Plaintiffs commenced separate actions challenging Local Law No. 22 as violative of the "takings" clauses of the federal and state constitutions. Supreme Court consolidated the actions and declared the law invalid to the extent that it imposed affirmative obligations on property owners to rehabilitate and then rent vacant units (134 Misc 2d 187). The city did not perfect an appeal; it did, however, alter the provisions of Local Law No. 22 by enacting Local Law No. 1 on February 22, 1987, which, in turn, was amended and reenacted as Local Law No. 9 on March 5, 1987. Local Law No. 9 extended the prior moratorium for an initial five-year period with the possibility of unlimited



renewals. The law retains most of the features which were contained in Local Law No. 22 but also provides for certain "exemptions" for otherwise obligated property owners.

The main provisions of Local Law No. 9 are as follows:

Moratorium. The conversion, alteration and demolition of SRO multiple dwellings are prohibited (§ 27-198.2); the moratorium extends for five years and is renewable for additional five-year periods as the city council deems necessary (§ 7).

Rehabilitation and Anti-Warehousing. SRO property owners must rehabilitate and make habitable every SRO unit in their buildings, and lease every unit to



a "bona fide" tenant ("rent-up" obligation) at controlled rents (§ 27-2151[a]); an owner is presumed to have violated these requirements if any unit remains vacant for a period of 30 days (§ 27-2152[d]).

Penalties. Noncompliance is punishable by fines including \$150,000 for each dwelling unlawfully altered, converted or demolished, with an additional \$45,000 per unit for reducing the total number of units (§ 27-198.2[g][2][5]); a \$500 per unit penalty is provided for each unit unrented to a bona fide tenant (§ 27-2152[e]).

Buy-Out and Replacement Exemptions. An owner may purchase an exemption from the moratorium by



payment of \$45,000 per unit (or such other amount as the Commissioner of the Department of Housing Preservation and Development determines would equal the cost of a replacement unit) or by providing an equal number of replacement units approved by the commissioner

(§ 27-198.2[d][4][a][i] and [ii].

Hardship Exemption. The amount of payment or the number of replacement units required for an exemption may be reduced at the discretion of the commissioner, in whole or in part, if "there is no reasonable possibility that such owner can make a reasonable rate of return", defined as a net annual return of 8 1/2% of the assessed value of the property as an SRO



multiple dwelling
(\$ 27-198.2[d][4][b]).

Plaintiffs instituted the present action challenging Local Law No. 9 on the same grounds that they had earlier challenged Local Law No. 22. Supreme Court, in another thorough opinion by Justice David B. Saxe, held that the so-called "buy-out," "replacement," and "hardship" exemptions failed to save Local Law No. 9 from the infirmities of its predecessor, and concluded that the law was invalid as a taking without just compensation in violation of both the federal and state constitutions. The Appellate Division disagreed, declaring the law constitutional in all respects.



For the following reasons, we now reverse.

II

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole" (Armstrong v. United States, 364 US 40, 49). The corollary to this oft-quoted proposition is that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation' " (First English Evangelical Lutheran Church



v. County of Los Angeles, 482 US 304, 315, quoting Armstrong v. United States, supra, at 49). The question here, as in any case where government action is challenged as violative of the right to just compensation, is whether the uncompensated obligations and restrictions imposed by the governmental action force individual property owners to bear more than a just share of obligations which are rightfully those of society at large.

In our opinion, the provisions of Local Law No. 9, which not only prevent the SRO property owners from developing their properties by replacing the existing structures, but also compel them to refurbish the structures and keep them fully

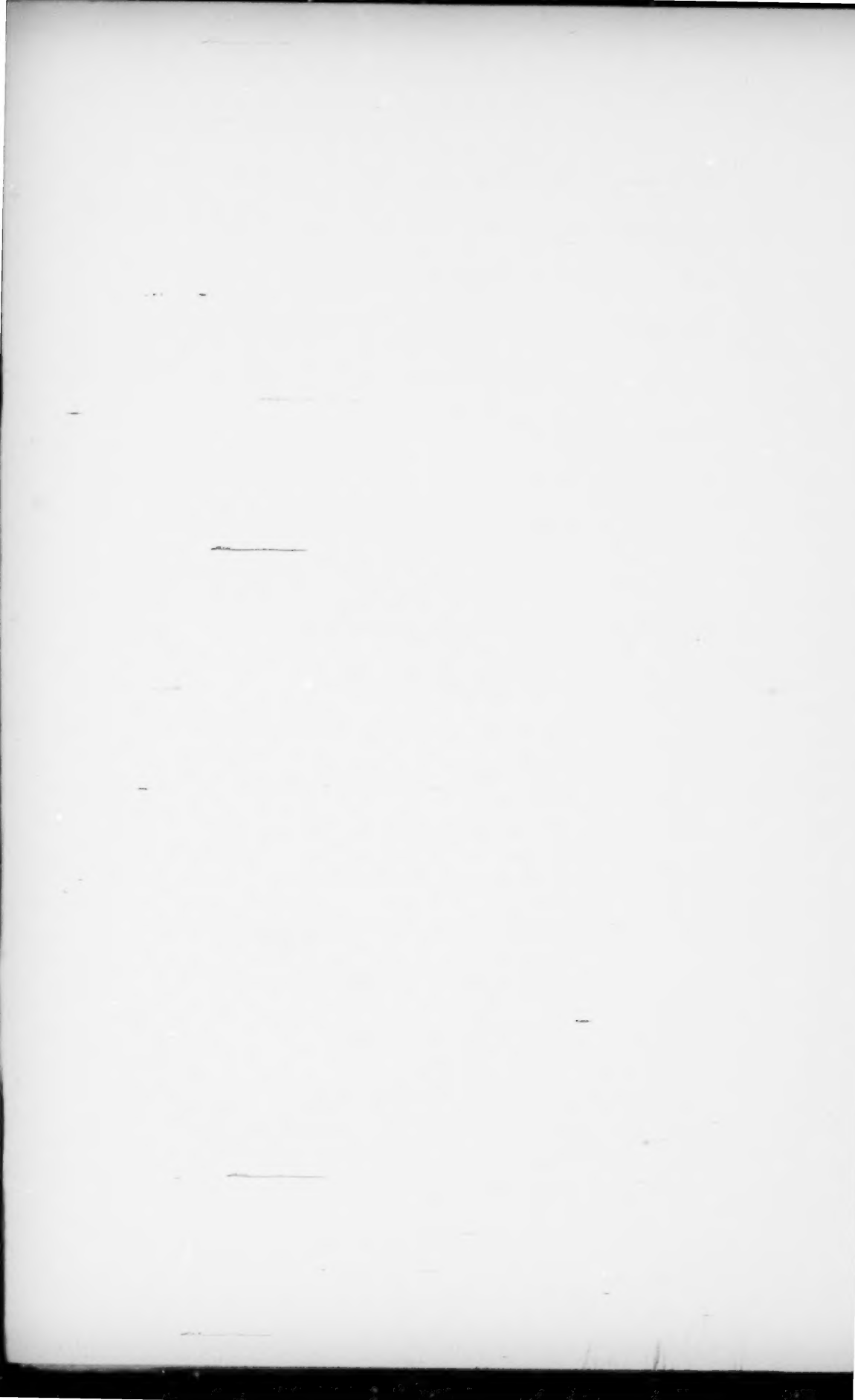


rented, impose on the property owners more than their just share of such societal obligations. Whether viewed as effecting a physical or regulatory taking, Local Law No. 9, we believe, violates the "takings" clauses of the Fifth Amendment of the Federal Constitution² and Article I, § 7 of the New York State Constitution.

A

Plaintiffs contend that Local Law No. 9 has resulted in a physical occupation of their properties and is, therefore, a per se compensable taking (see, Loretto v. Teleprompter Manhattan CATV

²The Fifth Amendment "takings" clause applies to the States through the Fourteenth Amendment (see, Chicago, B. & Q. R. Co. v. Chicago, 166 US 266).



Corp., 458 US 419, 427)). We agree. As emphasized by Professor Michelman in his article quoted with approval in Loretto, "the one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership" emphasis in original; footnotes omitted) (Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation" Law, 80 Harv L Rev 1165, 1184 [1967])).

Whether the mandatory "rent-up" obligations of the



anti-warehousing provision effect a physical taking depends upon the nature and extent of their interference with certain essential property rights. Here, the claimed physical taking is the city's forced control over the owners' possessory interests in their properties, including the denial of the owners' rights to exclude others. Local Law No. 9 requires the owners to rent their rooms or be subject to severe penalties; it compels them to admit persons as tenants with all of the possessory and other rights that that status entails; it compels them to surrender the most basic attributes of private property, the rights of possession and exclusion. This, plaintiffs contend, constitutes a

physical occupation of private property for public use, similar to encroachments on structures or land such as the mandated installation of CATV cables and fixtures (see, Loretto v. Teleprompter Manhattan CATV Corp., supra), the permanent flooding from the construction of a dam (see, e.g., United States v. Lynah, 188 US 445; Pumpelly v. Green Bay Co., 80 US 577), or the invasion of air space and resulting interference with the land-use below by continuous low altitude airplane flights (see, United States v. Causby, 328 US 256). Defendants argue that a physical taking must entail the kind of palpable invasion involved in those cases and, therefore, that the deprivation of intangible property



rights alone, such as that resulting from coerced tenancies, is not enough. We disagree. Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.

Under the traditional conception of property, the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space (see, Loretto v. Teleprompter Manhattan CATV Corp., supra, at 435). Thus, in Loretto, the Supreme Court relied upon this



classical view of property -- "the rights to possess, use, and dispose" (458 US at 435, quoting United States v. General Motors, 323 US 373, 378) -- to hold that the required installation of the CATV cables and equipment on plaintiff's building was a per se physical taking. This right to exclude "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights" (Loretto, supra, at 435-436, quoting Kaiser Aetna, 444 US 164, 179-180; see also, Restatement of Property § 7 [1936]; Radin, The Liberal Conception of Property: Cross Currents in the Jurisdiction of Takings, 88 Colum L Rev 1667, 1671-1672). As the Court noted in

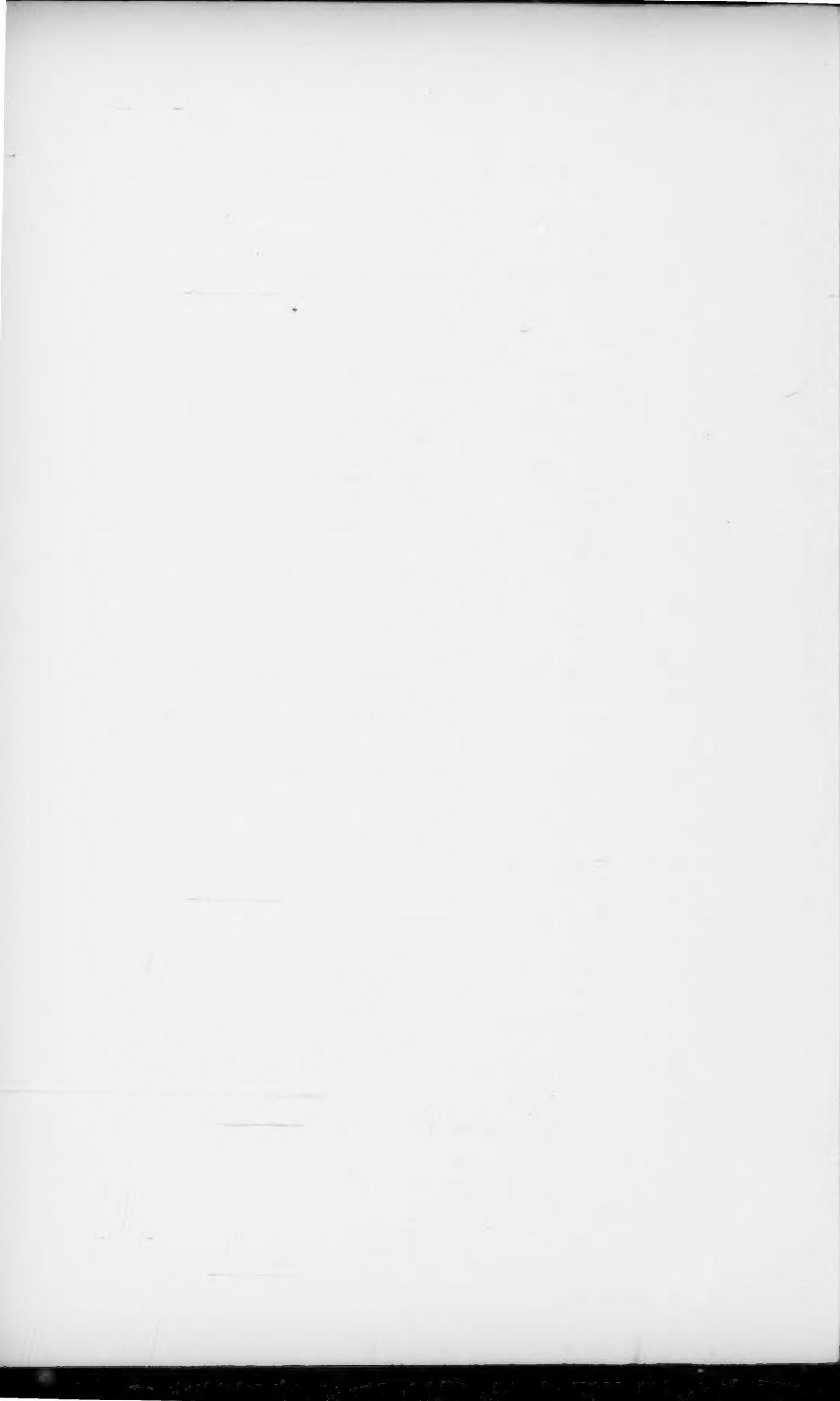


Loretto, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property", and "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property" (see, Loretto, supra, at 436 [emphasis in orig]; see also, Michelman, 80 Harv. L. Rev supra, at 1165, 1228, and n 110). Moreover, to constitute a physical taking, the occupation need not be by the government itself, but may be by third parties under its authority (Loretto, supra, at 432, 433 n 9).

Defendants argue, nevertheless, that a physical taking requires something more than



an ouster of the owner's possessory interest by the forced intrusion of strangers, some actual displacement of the owner's possession through a fixed encroachment like the TV equipment in Loretto or an invasion of property like the flooding in Pumpelly. But the decisional law is to the contrary. As the Supreme Court explained in Nollan v. California Coastal Commn, (483 US 825), a physical occupation requiring just compensation results where individuals are given the "right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises" (id., at ____ [slip opn at 6]). Likewise, in Kaiser



Aetna, in concluding that the government's imposition of a navigational servitude requiring public access to a private pond and marina would "result in an actual physical invasion of the privately owned marina," the court emphasized that the right to exclude, thus taken from the owner, is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (444 US at 176, 180).³

³The Loretto court in dictum -- referring to the navigational easement of passage permitting public access to plaintiff's privately owned marina in Kaiser Aetna stated that, although the easement constituted a physical invasion of plaintiff's property, it was not a per se taking but "a government intrusion of an unusually serious character" (458 US at 433). The court in Nollan apparently adopted a different view and it would seem (Footnote Continued)



Although the Supreme Court has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a per se physical taking, we believe that it would. Indeed, it is difficult to see how such forced occupancy of one's property could not do so. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far

(Footnote Continued)

that a physical taking of the type at issue in Kaiser Aetna would now be considered to be a per se taking to the extent of the occupation (see, Nollan v. California Coastal Commn., supra, at ___ [slip opn at 6]; see, Note, Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution, 102 Harv L Rev 992).



more offensive and invasive than the easements in Kaiser Aetna or Nollan or the installation of the CATV equipment in Loretto (see, Michelman, Takings, 1987 88 Colum L Rev 1600, 1609 n 46; see also, Hall v. City Santa Barbara, 833 F2d 1270 [9th Cir], cert den 108 S Ct 1120 [an ordinance imposing mandatory rental obligations on mobile home operators could constitute a per se physical taking under Loretto]).⁴

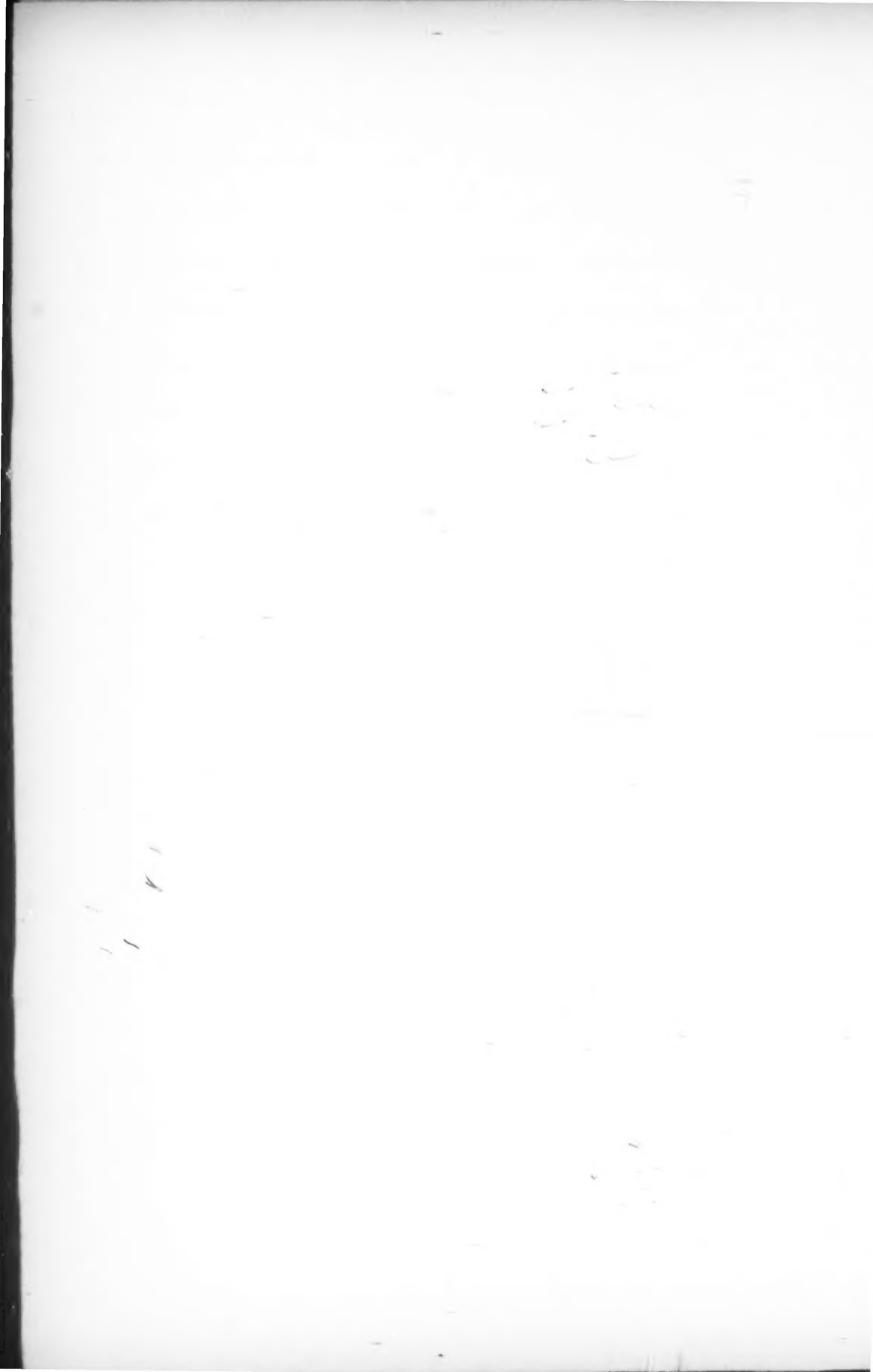
⁴It should be noted that the Hall decision preceded the Supreme Court's decisions in Nollan, First Lutheran Church and Keystone Bituminous Coal Assn v. DiBenedictus (480 US 470). Defendants' efforts to distinguish Hall upon the ground that the forced leases there were of indefinite duration and transferable are not persuasive. Here, the tenants will occupy the SRO units with all of the legal protection against eviction afforded by applicable landlord-tenant statutes, including those pertaining to rent (Footnote Continued)



Contrary to defendants' contentions, the decisions of the Supreme Court and this court upholding rent control and similar regulations of housing conditions and other aspects of the landlord-tenant relationship (see e.g., Bowles v. Willingham, 321 US 503, 517-518; Laub Estates v. Druhe, 300 NY 176, 180; see also, cases cited in Loretto v. Teleprompter Manhattan CATV Corp., supra, at 440) do not undermine plaintiffs' claims of per se physical takings. Indeed, those

(Footnote Continued)

control, rent stabilization and harassment. The significant point is that in Hall, as in the case at bar, the owners were deprived of their possessory interests -- particularly the right to exclude strangers -- the determinative factor in Kaiser Aetna, Loretto, and Nollan.



decisions have no bearing on the question here -- whether forcing plaintiffs to rent their properties to strangers constitutes a physical taking. It is the nature of the intrusion which is determinative -- i.e., that it deprives the owners of their rights to possession and exclusion -- not the beneficial purpose of the regulation or the extent of the police power which authorizes it. Thus, the Loretto court, in referring to Bowles v. Willingham and similar cases, dispelled the notion that its physical-taking holding would affect "the government's power to adjust landlord-tenant relationships"; the court was quick to distinguish landlord-tenant cases from those in which "the

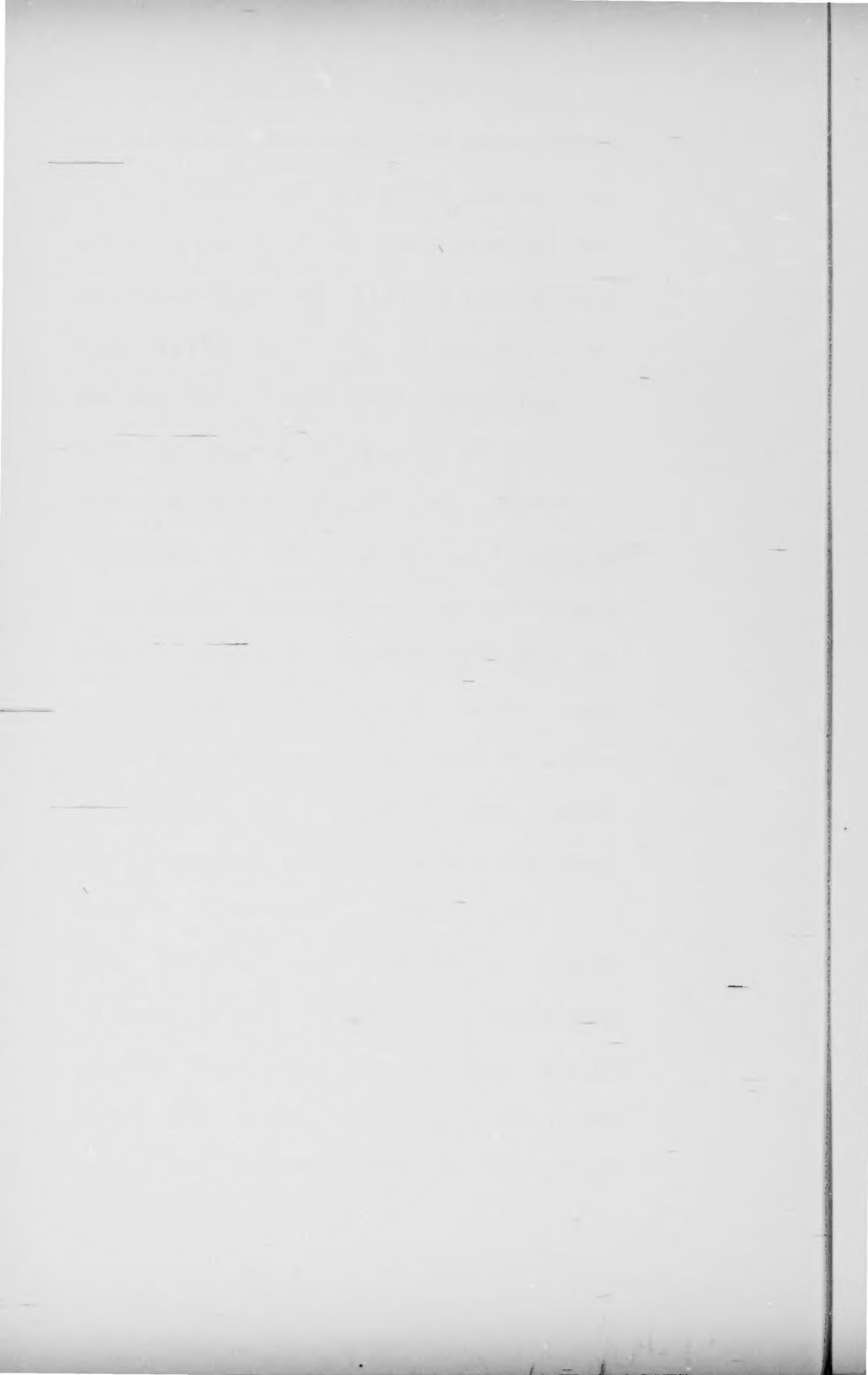
government authorize[d] the permanent occupation of the landlord's property by a third party" (458 US at 440).

The rent control and other landlord-tenant regulations that have been upheld by the Supreme Court and this court merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing. Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired. The local law at issue in Loab Estates, for example, barred the eviction of residential tenants unless



provisions had been made for their relocation (300 NY at 179). And the federal rent-control statute in Bowles explicitly did not require "any person . . . to offer any accommodation for rent" (321 US at 517). By sharp contrast to the statutes in Loab Estates and Bowles, Local Law No. 9 compels owners to be residential landlords; it requires owners to rehabilitate and offer their properties for rent, as SRO units, to persons with whom they have no existing landlord-tenant relationship.

The City, however, argues that, although the owners are compelled to rent their units, there can be no physical taking here because they have not been divested of all control over the



selection of tenants and the rental terms. But this minimal authority retained by the owners over their own properties does not distinguish the City's action here from other physical takings. It is the forced occupation by strangers under the rent-up provisions of the law, not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests and results in physical takings.⁵

⁵ Although not urged by the City, some amici contend that a physical taking should not be found because the interference with the owners' rights resulting from Local Law No. 9 is not permanent. There is no merit to the argument for two reasons: (1) while not specifically made permanent, Local Law No. 9 is, by its own terms, to remain in effect indefinitely since its five-year terms may be extended for additional terms
(Footnote Continued)



We conclude that Local Law No. 9 has effected a per se physical taking because it "interfere[s] so drastically" (Nollan v. California Coastal Commn., supra, at ____ [slip opn at 10]) with the SRO property owners' fundamental rights to possess and to exclude (see, Loretto v. Teleprompter Manhattan CATV Corp., supra, at 435-436). The law requires nothing less of the owners than "to suffer the physical occupation of [their]

(Footnote Continued)

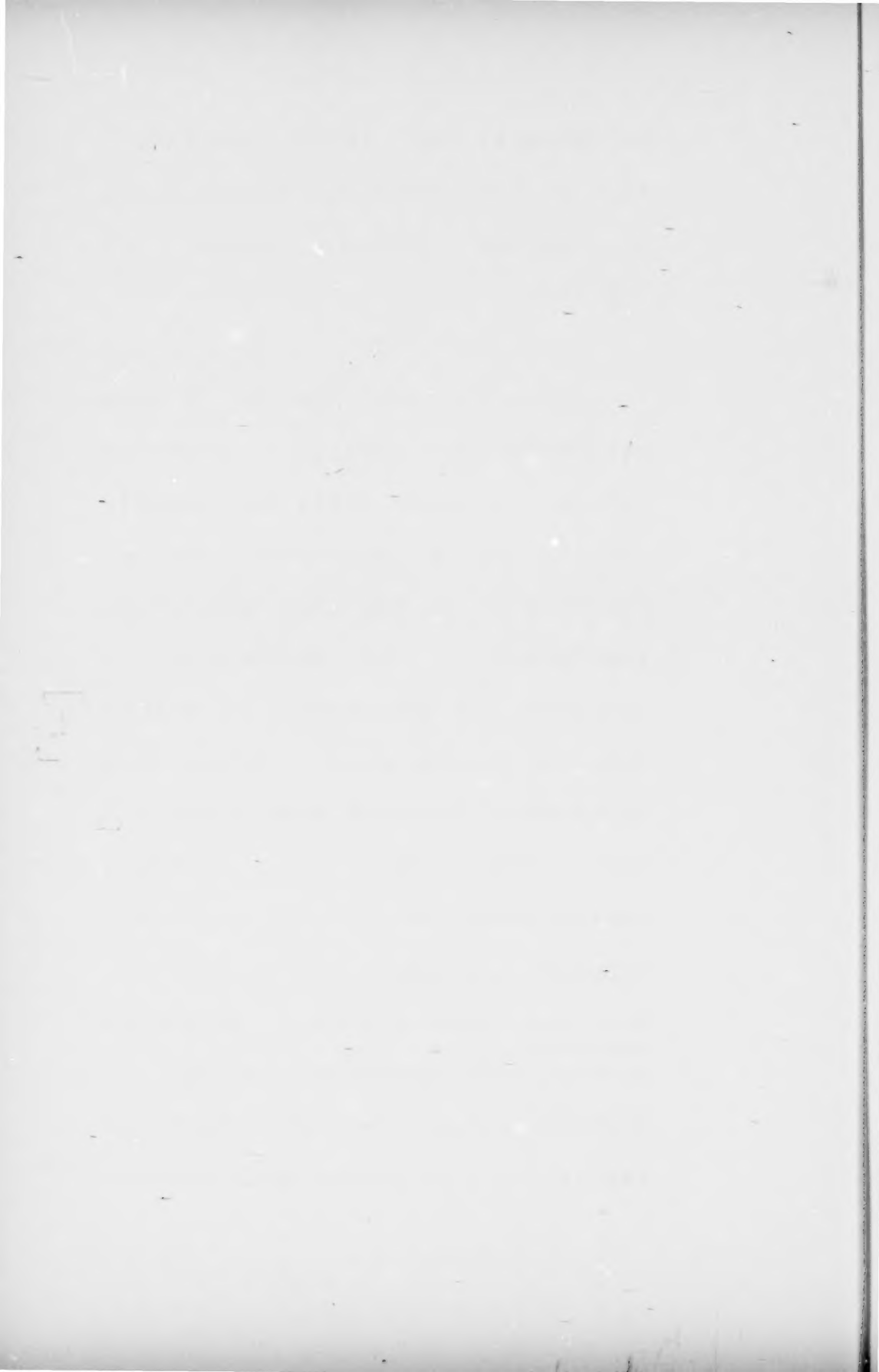
without limit; and (2) even if local law be viewed as a temporary provision, it results in a deprivation of the owners' quintessential rights to possess and exclude and, therefore, amounts to a physical taking. Under First Lutheran Church, supra, where, as here, the governmental action resulted in a per se taking, the offending action constitutes a taking for whatever time period it is in effect.



building[s] by third part[ies]"
(Id. at 440; see also, Kaiser Aetna
v. United States, supra, at
179-180).

B

Even if Local Law No. 9 were
not held to effect a physical
taking, it would still be facially
invalid as a regulatory taking.
"Suffice it to say that government
regulation -- by definition --
involves the adjustment of rights
for the public good. Often this
adjustment curtails some potential
for the use or economic
exploitation of private property"
(Andrus v. Allard, 444 US 51, 65).
But the constitutional guarantee
against uncompensated takings is
violated when the adjustment of
rights for the public good becomes



so disproportionate that it can be said that the governmental action is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Armstrong v. United States, *supra*, at 49). There is no "set formula" for determining in all cases when an adjustment of rights has reached the point when "justice and fairness" require that compensation be paid (see, Penn Central Trans. Co. v. New York City, 438 US 104, 124). It is basic, however, that such a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, or (2) if it does not



substantially advance legitimate state interests (see, Nollan v. California Coastal Commn., supra at ____ [slip opn at 8]; Keystone Bituminous Coal Assn. v. DiBenedictus, 480 US 470, 485, 495; Agins v. Tiburon, 447 US 255, 260; Penn Central Trans. Co. v. New York City, supra, at 138 n 36).⁶ Either would be sufficient to invalidate a property-use regulation. In our opinion, Local

⁶The Supreme Court seems also to have adopted the view that a regulation which has the effect of substantially frustrating "reasonable investment backed expectations" likewise constitutes a per se taking (see e.g., Kaiser Aetna v. U.S., supra, at 175; Keystone Bituminous Coal Assn. v. DiBenedictus, supra, at 493, 499; see also, Michelman, 88 Colum L Rev, supra, at 1604 n 22, 1622). Such a factor, however, would be relevant to a challenge to the regulation as applied to particular owners, not a facial challenge.



Law No. 9 fails on both counts. We turn first to whether the law denies owners the economically viable use of their properties.



(1)

Putting aside for the moment a discussion of the buy-out, replacement, and related hardship exemptions, the significant effects of Local Law No. 9 on the SRO property owners are: (1) to prohibit them from altering or demolishing their buildings or converting them to any other use; (2) to compel them to restore any uninhabitable unit to "habitable condition"; and (3) to require them to keep all their units occupied as SRO housing. Noncompliance with any of these provisions subjects an owner to heavy penalties.⁷

⁷As outlined supra, Local Law No. 9 provides for the imposition of a \$150,000 civil fine for each room altered,
(Footnote Continued)



If analyzed with respect to its effect on property owners' basic rights " 'to possess, use and dispose' " of their buildings (Loretto v. Teleprompter Manhattan CATV Corp., supra, at 435, quoting United States v. General Motors Corp., supra, at 378; see also, Restatement of Property, § 5 Comment E, p. 11; Nichols, § 5.01, "What Constitutes Property"), it is evident that Local Law No. 9 abrogates or substantially impairs each of the three rights. As previously discussed, the coerced rental provisions deprive owners

(Footnote Continued)

converted or demolished in violation of the ordinance and an additional \$45,000 per room for any resulting reduction in the total number of single room occupancy units (see, § 27-198.2[d].4[g]. 2,[5]).



the fundamental right to possess their properties (see, Part II A, supra). Moreover, these mandatory rental provisions -- together with the prohibition against demolition, alteration and conversion of the properties to other uses, and the requirement that uninhabitable units be refurbished -- deny owners of SRO buildings any right to use their properties as they see fit.

Unquestionably, the effect of the law is to strip owners of SRO buildings -- who may have purchased their properties solely to turn them into profitable investments by tearing down and replacing the existing structures with new ones (as plaintiffs claim they have) -- of the very right to use their properties for any such purpose.



Owners are forced to devote their properties to another use which, albeit one which might serve the City's interests, bears no relation to any economic purpose which could be reasonably contemplated by a private investor.

Finally, Local Law No. 9, particularly in those provisions prohibiting redevelopment and mandating rental, inevitably impairs the ability of owners to sell their properties for any sums approaching their investments. Thus, the local law must also negatively affect the owners' right to dispose of their properties. By any test, we think these restrictions deny the owners "economically viable use" of their properties.



The effect of Local Law No. 9 is unlike that of the Landmark Law in Penn Central, which denied the owner of Grand Central neither the continued full use of its property nor a 'reasonable return' on its investment.⁸ Nor is the effect of Local Law No. 9 comparable to that of the Subsidence Act in Keystone, which reduced the maximum amount of coal that could be mined, but did not interfere with the owners' rights to continue to mine coal

⁸ Moreover, the court in Penn Central pointed out that, while the landmark commission had denied an application to build more than 50 stories above the terminal, there was no showing that permission to build fewer would be denied. Additionally, the court noted that Penn Central had not been deprived of all pre-existing air rights, since under the law these rights were transferable (438 US 104, 136-137).



profitably.⁹ By contrast, Local Law No. 9 totally prohibits the use -- entirely permissible before the enactment of the law and the sole purpose for purchasing investment properties -- commercial development. As a substitute, it decrees that the properties must be used for SRO housing and that the owners must be satisfied with the diminished financial returns from such use. A rough analogy might be

⁹The majority in Keystone emphasized that, under the statute there in question, the property owners could continue to engage profitably in the business for which they had invested their capital (480 US at 485) and that the statute ultimately prevented the owners from mining only 2% of the extractable coal (id., at 493). Not surprisingly, then, the majority concluded that the owners failed to demonstrate "any deprivation significant enough" to constitute a regulatory taking (id., at 493).



telling the mine owners in Keystone that they could no longer mine coal and that they must instead put their properties to some worthy, but less remunerative, purpose -- say, storing nuclear waste.

There can be no question that the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the "bundle of rights" making up their fee interests (see, Michelman, 80 Harv L Rev supra, at 1233 [prospective continuing use "is a discrete twig out of [the owner's] fee simple bundle" of rights]). Indeed, in French Invest. Co. v. City of NY (39 NY2d 587), we recognized that development rights "are an essential component of the value of



the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property" (id., at 597; see also, Matter of Keystone Assoc. v. Moerdler, 19 NY2d 78 [invalidating the imposition of an uncompensated 180-day delay on the right of the purchasers of the old Metropolitan Opera House to demolish and redevelop the property]; Foster v. Scott, 136 NY 577).

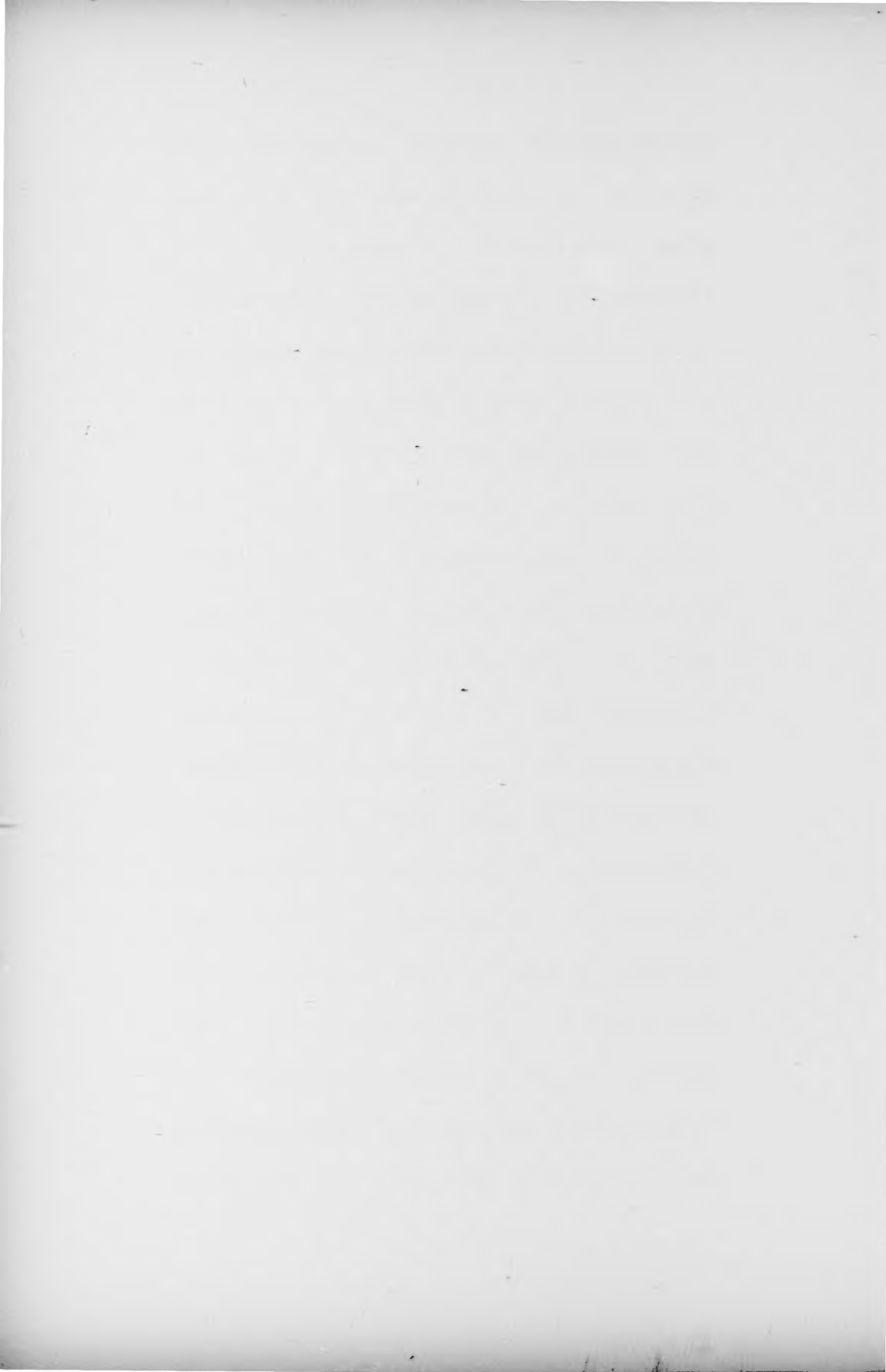
Defendants' argument that plaintiffs have not been deprived of "economically viable use" presupposes that the effect of Local Law. No. 9 on their



properties should be assessed by comparing the value of the rights affected or abrogated with the value of the total "bundle" comprising the owners' property interests. But the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking. Thus, in Hodel v. Irving (481 US 704), the Court held that the total abolition of the "right to pass on valuable property to one's heirs" could, without more, "be a taking" (id., at 715, 717). And in Nollan, the court concluded that an easement allowing persons to pass across a private beach could constitute a taking despite the minimal impact on the total



value of the owners' property (483 US at ____ [slip opn at 6]; see also, various comments on the theory of "conceptual severance" [i.e., assessing only the value of the rights taken without regard to its relationship to the value of the whole property], Radin, 88 Colum L Rev, supra, at 1674-1678; Michelman, 88 Colum L Rev, supra, at 1627-1628; Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 Colum L Rev 1581, 1592-1593; Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L J 335, 356-357). Of course, if the theory of "conceptual severance" were applied to the effect of Local Law No. 9 on



the rights of SRO property owners, a taking would necessarily be found. The rights to use and to possess have been abolished and, without regard to the value of the owners' remaining interests in their buildings, that would be sufficient.

As stated by Justice Saxe at the nisi prius court, the moratorium and anti-warehousing provisions "place petitioners in a business, force them to remain in that business and refuse to allow them to ever cease doing [that] business" (Seawall Associates v. City of New York, 134 Misc 2d 187, 197). By any criterion -- whether the property rights abolished or impaired are considered alone, as in Hodel and Nollan, or the values



of these rights are compared with the values of the properties as a whole, as in Penn Central and Keystone -- the conclusion is inescapable that the effect of the provisions is unconstitutionally to deprive owners of economically viable use of their properties.

(2)

We agree with plaintiffs, moreover, that Local Law No. 9 does not pass the other threshold test for constitutional validity of regulatory takings: that the burdens imposed substantially advance legitimate state interests (see, Nollan v. California Coastal Commn., supra; Agins v. Tiboron, supra; Penn Central, supra).

Of course, the end sought to be furthered by Local Law No. 9 is



of the greatest societal importance -- alleviating the critical problems of homelessness.¹⁰ The question here, however, concerns the means established by the local law purportedly to achieve this end. In other words, can it be said that imposing the burdens of the forced refurbishing and rent-up provisions on the owners of SRO properties substantially advances the aim of alleviating the homelessness problem? (See, Nollan v. California Coastal Commn., supra, at ___, ___ [slip opn, at 8,

¹⁰"Preventing homelessness" is what the City itself claims to be the public purpose served by Local Law No. 9 (see, Municipal Respondents' Brief, pp. 31-33; see also Local Law No. 1 of 1987, section 1). We need not, therefore, apply the "close nexus" test to other, hypothetical purposes possibly advanced by the law.



15].) Is there a sufficiently close nexus between these burdens and "the end advanced as the justification for [them]"? (Id., at ___ [slip opn, at 11]; see also, for discussions of the "close nexus" test which requires "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in Nollan, Michelman, Colum L Rev, supra, at 1607-1614; Peterson, 39 Hastings L Rev, supra, at 354-358; Note, Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Report, 54 Brooklyn L Rev 991, 1011-1020).

Defendants contend that by increasing the availability of SRO units the anti-warehousing and



moratorium measures will provide more available low-cost housing and, thereby, further the aim of alleviating homelessness; this relationship between means and ends, they argue, supplies the required "close nexus." The City's own Blackburn study, however, acknowledges that a ban on converting, destroying and warehousing SRO units would do little to resolve the homeless crisis. Indeed, the SRO units are not earmarked for the homeless or for potentially homeless low-income families, and there is simply no assurance that the units will be rented to members of either group (see, Blackburn, Single Room Occupancy In New York City, supra, at 5-6). While, of course, any



increase in the supply of low-cost housing would benefit some prospective tenants, it is by no means clear that it would actually benefit the homeless.¹¹

¹¹The dissenter's claim that our ruling "authorizes the expulsion of 52,000 people" (see, slip dissenting opn, at 16) is utterly without basis. As we have already discussed, government has considerable latitude in regulating landlord-tenant relationships to preclude eviction in hardship, emergency and rent-control cases, and both this court and the Supreme Court have upheld such efforts (see, supra, at pp. 10-12). The constitutional invalidity of Local Law No. 9 does not concern the protection it affords to current tenants, but its mandate that property owners rehabilitate their buildings and accept -- as new residents -- persons with whom they have no existing relationship whatsoever.

Finally, the dissenter's argument that Local Law No. 9 must be upheld to prevent the disruption of tenancies is a "bootstrap." Local Law No. 9 cannot, of course, be deemed constitutional on the ground that it would preserve tenancies which the law, in the first instance, imposes on the property owners unconstitutionally.



The heavy exactions imposed by Local Law No. 9 must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required "close nexus" has been made. Rather, the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem. Indeed, by equating the "cure" with dollars -- i.e., permitting "buy-out" payments of \$45,000 per SRO unit in lieu of

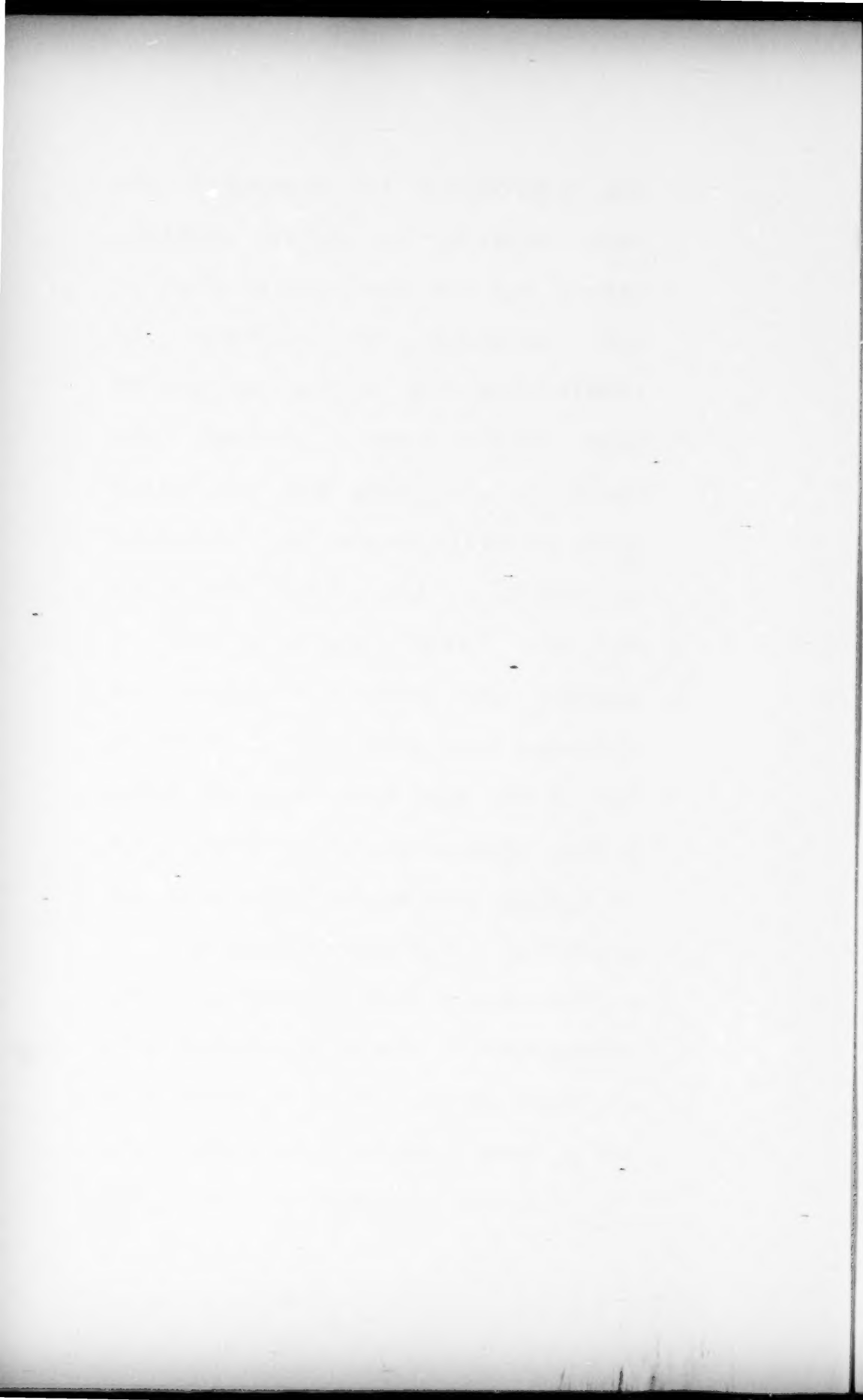


keeping the units available for rent [see discussion of "buy-out" exemption, infra] -- the terms of Local Law No. 9 itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.

Finally, the questionable nexus between means and ends in Local Law No. 9 cannot be compared with the clearly defined means-ends relationships in the statutes upheld in Penn Central, Keystone and Andrus -- the decisions on which defendants rely. In Penn Central, the Landmark Law had the direct and immediate effect of saving a historic landmark, Grand Central Station, the law's very purpose. Likewise, in Keystone,



the Subsidence Act prevented the very hazards to public health, safety and the environment that it was intended to address by prohibiting the mining operations that caused them. Indeed, the Court in upholding the act noted that it fell within the "nuisance exception" -- i.e., that "the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity" (480 US at 491, n 20; see, Michelman, 88 Colum L Rev, supra, at 1601-1604). And in Andrus, the Eagle Protection Act protected endangered eagles by prohibiting a direct cause of their endangerment, the unrestricted sale of their parts. No such connection has been shown between the restrictions imposed on SRO



property owners by Local Law No. 9 and the amelioration of the homeless crisis in New York City. The close relatedness between the ends to be achieved and those who are burdened, as existed in Penn Central, Keystone and Andrus, is just not present.



III

The question remains whether the added features of Local Law No. 9 -- the buy-out, replacement and hardship exemptions¹² -- in some way mitigate the invidious

¹²See Section 27-198.2(d)(4)(a). The so-called "buy-out" provisions, in effect, permit the owners to "purchase" from the City their freedom from the operation of Local Law No. 9 by paying either \$45,000 per unit (e.g., \$9,720,000 for a 216 unit building such as that owned by 459 West 43d Street Corp.) or creating a replacement unit for any unit taken off the SRO housing rental market. A replacement unit may be and must be approved by the commissioner. In effect, the "buy-out" provisions permit the owners to repurchase the basic property rights in their buildings which the City has appropriated under Local Law No. 9. The hardship provisions (section 27-198.2 [d][4][b]) permit a reduction in the "buy-out" price, at the discretion of the commissioner, when an owner's return on an SRO property falls below 8 1/2% of assessed value. As the provisions point out, however, there are no standards or guidelines for the exercise of the commissioner's discretion.



effects of the law so that it becomes constitutionally acceptable. We agree with Justice Saxe that they do not (Seawall Assocs. v. New York, 134 Misc 2d 198). The reasons, we think, are evident.

If, as we hold, the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclusion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the



city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a "ransom" cannot make it lawful. Indeed, the stark alternatives offered by Local Law No. 9 -- either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units) -- amount to just the sort of exaction which could be classified, not as "a valid regulation of land use but, 'an out-and-out plan of extortion.'" (J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A. 2d 12, 14-15 [1981])" (Nollan v. California Coastal Commn., supra, at ____ [slip opn, p.



11]; see also, Sterk, Nollan, Henry George, and Exactions, 88 Colum L Rev 1731, 1746-1751).

Nor can the hardship exemption make a difference. It can do no more than permit the commissioner -- in the event that an owner could ever come within its provisions¹³

¹³ See Section 27-198.2(d)(4)(b). As some of the owners argue, it is unrealistic to expect that the hardship exemption will ever be of any appreciable value to an investor in one of the Manhattan SRO properties. The level of earnings below which a given property must fall before the owner can apply for hardship relief is pegged at a mere 8 1/2% of the property's assessed value. It is highly unlikely that any of the properties, which must be kept fully rented, will ever produce less than 8 1/2% assessed value, even though the properties are subject to rent control and rent stabilization. The assessed value generally represents only 45% of the full value assigned to the property by the city's appraiser. Moreover, plaintiffs point out that the city's appraisal of the property is based on their current use as low-income SRO rental housing. Thus, the
(Footnote Continued)



-- to exercise his discretion and lower the purchase price of escape from the law. If Local Law No. 9 creates an illegal taking notwithstanding the buy-out and replacement options -- as we hold it does -- it certainly does not become legal simply because an owner may, in some cases, buy his way out of the law by paying a lesser sum.

Finally, defendants' efforts to uphold Local Law No. 9 miss a key feature of the law here and the one that distinguishes it from the Landmark Law in Penn Central, the

(Footnote Continued)

city's appraised full value will typically bear little relation to the property's true market value for development purposes or to the amount of the owner's purchase price.



Subsidence Act in Keystone, and the Eagle Protection Act in Andrus. Unlike the regulatory actions in those cases, which simply limited the owner's conduct, Local Law No. 9 not only prohibits conduct but affirmatively requires that the owners dedicate their properties to a public purpose. They must maintain their properties as SROs, they must rehabilitate them, and they must keep them fully rented (see, discussion of significant distinction for purposes of takings analysis between "affirmative easements or servitudes" [as, for example, in Kaiser Aetna] and "those that are negative" [as, for example, in Penn Central], Radin, 88 Colum L Rev, supra, at 1667, 1678-1680). Like the property



owners in Loretto, Kaiser Aetna and Nollan, who must subject their properties to public use for purposes of fixing CATV cables or allowing public access to a private marina or across a private beach, owners of SRO buildings have had the use of their properties actually appropriated for the benefit of the public.

In short, the city, by affirmatively requiring the owners to put their properties to a public use, "is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good" (Lutheran Church v. City of New York, 35 NY2d 121, 128-129; see, French Investing Co. v. City of New York, supra at 593; Saxe, Takings and the Police Power,



74 Yale L J 36, 62-63). No one disputes the city's authority, under the police power, to require the SRO owners to put their properties to this use. As an exercise of this authority, however, the stringent obligations imposed by Local Law No. 9 without any offsetting provision for fair payment -- like the governmental actions at issue in Loretto, Kaiser Aetna, and Nollan -- amount to an unconstitutional confiscation of the owners' property.

IV

We believe it is evident from an analysis of Local Law No. 9 that the moratorium and anti-warehousing provisions inevitably force property owners "alone to bear public burdens which in all



fairness and justice should be borne by the public as whole" (Armstrong v. U.S., supra, at 49). Because the owners are, by the terms of the law, afforded no compensation, Local Law No. 9, we hold, is facially invalid¹⁴, under

¹⁴ Contrary to assertions in the dissenting opinion (see, slip dissenting opn at pp. 2-3, 6-9), the Supreme Court and this court have long considered it entirely appropriate to adjudge the facial validity of a land use regulation when challenged by a property owner claiming an unconstitutional "taking" or other deprivation of property rights. As the Supreme Court held over 60 years ago in Euclid v. Ambler Realty Co., (272 US 365), a property owner is entitled to challenge a local law regulating the use of his realty on the ground that "the ordinance of its own force operates greatly to reduce the value of [the owner's] lands and destroy their marketability, commercial and residential uses" (id., at 386 [emphasis added]). "Assuming [the owner's] premises", the court explained, "the existence and maintenance of the ordinance, in effect, constitutes a present invasion of [the owner's] property" (Footnote Continued)



the "takings" clauses of both the federal and state constitutions

(Footnote Continued)

rights and a threat to continue it. Under these circumstances. . . jurisdiction is clear" (id. [emphasis added]). The Court further elaborated that the property owner was not claiming specific injury from the actual application of the local law, but "that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute[d] a present and irreparable injury" (id., at 395 [emphasis added]).

More recently in Hodel v. Virginia (supra) and in Keystone (supra), the Supreme Court repeated the distinction between a facial challenge and one based on application. A "facial challenge," the Court noted, "present[s] no concrete controversy concerning either application of the [law] to particular [activities] or its effect on specific [properties]" (Keystone, supra, at 495, quoting Hodel v. Virginia, supra, at 295). Numerous such facial challenges have been sustained by both the Supreme Court and our court (see e.g.,
(Footnote Continued)



(U.S. Const. Amends 5, 14; NY Const Art 1, § 7).¹⁵

One last point should be made. The dissent's erroneous analogy between this case and Lochner v. New York (198 US 45) furnishes a useful perspective on what is really at issue here. In Lochner,

(Footnote Continued)

Nollan v. California Coastal Commn., supra, at ___, ___ [slip opn, at 8, 11]; Hodel v. Irving, supra, at 716-717; Loretto v. Teleprompter Manhattan CATV Corp., supra, at 434-435; French Investment Co. v. City of New York, supra, at 590-591; Westwood Estates v. Vil. of S. Nyack, 23 NY2d 424, 427; see also, Beacon Hill Farm Assoc. v. London Cty Bd. of Supervisors, ___ F2d ___, 1989 WL 54784).

¹⁵ In view of this holding, we need not decide the extent to which, if at all, the protections of the "takings clause" of the New York State Constitution differ from those under the Federal Constitution. Nor is it necessary to address plaintiff's additional arguments, including their contention that the local law is also unconstitutional under the due process clause of the State Constitution (NY Const Art 1, § 6).



the Supreme Court -- applying a laissez faire jurisprudence of "economic due process" -- overturned a law prescribing maximum working hours, on the ground that it violated the freedom of contract rights of both employer and employee; the Court held that the Legislature was without power to enact such a law. Here, by contrast, no one disputes the City's power -- indeed its duty -- to fashion meaningful solutions to address homelessness. No one disputes that the City has the power to prohibit the demolition of SRO properties, or direct restoration of SRO units to habitable condition to be leased at modest rents for indefinite periods. The City clearly has that



power. The question is who is to pay for this, and, more particularly, whether the City -- in accordance with constitutional mandate -- must compensate property owners before it can "place [them] in a business, force them to remain in that business and refuse to allow them to ever cease doing [that] business." (134 Misc 2d 187, 197.) The issue is not one of "economic due process," but constitutional command.

No one minimizes the tragic reality of homelessness. But the City's response -- to foist its responsibility on certain private property owners, by requiring them to remain in the SRO business or ransom their property rights -- simply does not meet the



requirements of the federal and state constitutions.

The order of the Appellate Division should be reversed, with costs, Local Law No. 9 declared to be unconstitutional as stated in this opinion, and defendants enjoined from implementing the law's provisions.



BELLACOSA, J. (dissenting):

I vote to affirm the declaration of facial constitutionality of New York City's Local Law 9 -- the Single Room Occupancy (SRO) Moratorium Law (Administrative Code of City of New York §27-198.2).

In 1904, Justice Holmes wrote the quintessential dissenting opinion in Lochner v. New York (198 US 45, 74), which presciently warned against his own Court declaring unconstitutional an act of the New York State Legislature attempting to limit the working hours of children. The historical, economic, social, legal, policy and constitutional parallels to the facial jettisoning of New York City's SRO law suggest that it



would be far better to harken to that history instead of being condemned to relive it.

Justice Holmes eloquently and cogently sums up the relevancy:

[A] constitution is not intended to embody a particular economic [or property] theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views. * * * General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. * * * I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our



people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us (id., at 75-76 [emphasis added]).

Nor on the Local Law before us either!

Eighty-five years after Lochner, we observe property rights, like the contract rights of that bygone era, being exalted over the Legislature's assessment of social policy. Like the economic theories underlying Lochner we, as judges, should not inquire into the wisdom or wholesomeness of SRO's as shelter for potentially 52,000 new, displaced homeless persons -- that policy choice belongs to the elected officials who enacted the law (see, Lochner v. New York,



supra, at 75; Boreali v. Axelrod, 71 NY2d 1, 12).

It would seem fundamental that a law that has no real impact upon a person does not deprive that person of a constitutional right. The majority, however, ignores that the SRO law will have varied affects on different landowners. Perhaps there are properties subject to this law for which SRO operation is the highest and best use. For other SRO operations, 8 1/2% may be a generous rate of return. It is likely that there are SRO owners who have never intended to further develop or differently develop their property. Of course, these persons are not before the Court and, if they were, their interests might well be

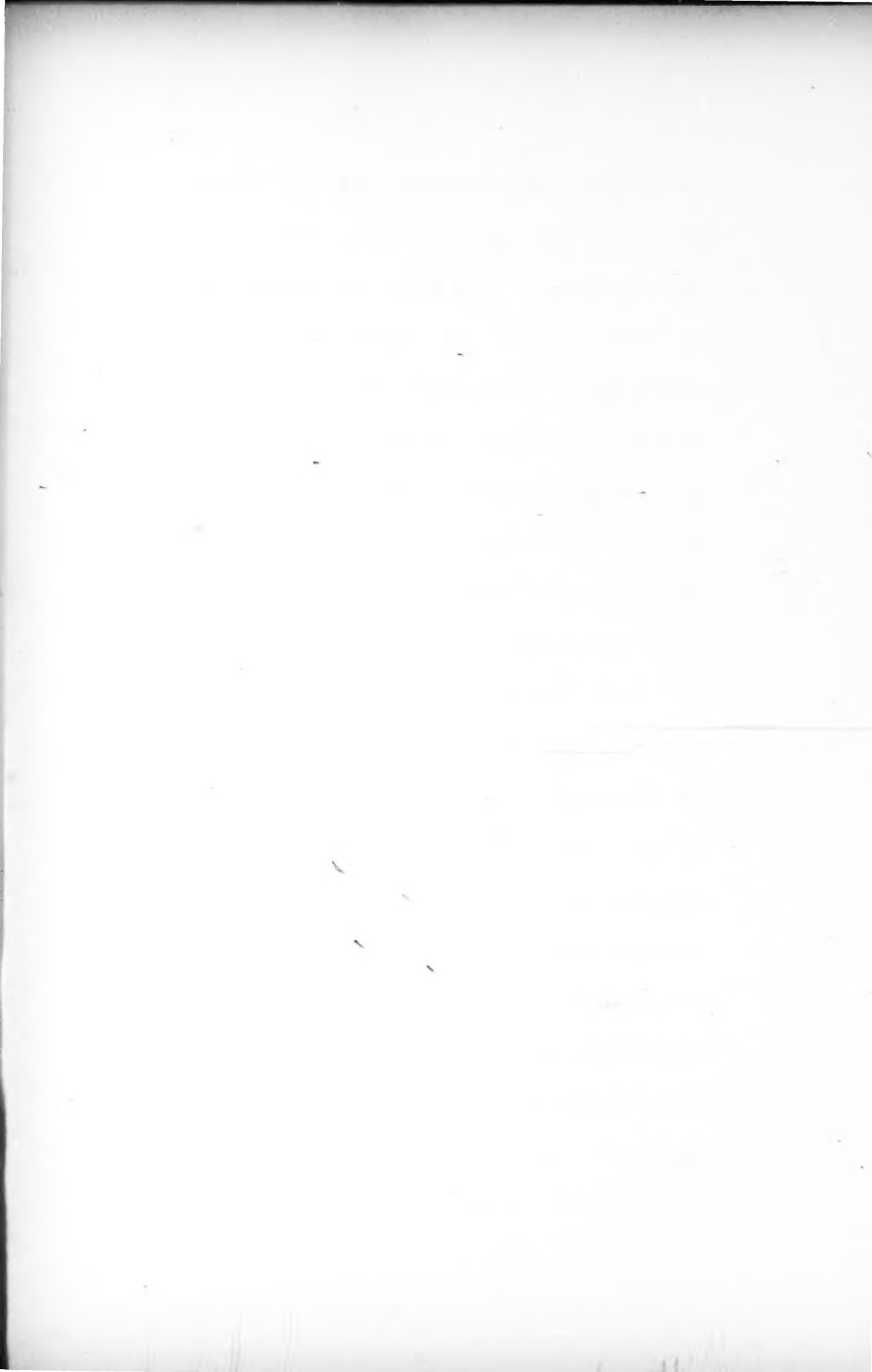


served by upholding the SRO law. Yet, without a record or the means to assess the differing impacts and with no attempt to make this assessment, the majority holds that Local Law 9 facially results in a regulatory taking with respect to every SRO dwelling in the City of New York. Resisting the blanket approach and using the concrete facts of an individual case is not a novel approach, especially in this area of constitutional law (see also, Ward v. Rock Against Racism, ___ US ___, ___ S. Ct. ___ 1989 WL 65720, at 19).

The legislation enjoys a presumptive threshold of constitutionality. Research reveals no cases in which the Supreme Court or our Court have



used the regulatory taking theory to undo a legislative act on a facial attack. Also, no precedents in the orbit of this case have previously ventured into the per se physical taking universe to declare a legislative act facially unconstitutional. It could well be that, due to the need to assess the real economic impact of this kind of law upon different property owners before a regulatory taking is decreed, no such doctrine as a facial challenge to a law as a regulatory taking will be recognized. But even if such a proposition is possible, it certainly has not been found to and should not be allowed to be applied against a law such as the challenged one which inherently



impacts on widely diverse and different property owners.

The ardently protected economic liberties of property owners to do with their property as they wish, as long as that use does not interfere with the liberty of others to do the same -- the shibboleth upon which the dual "taking" analysis is erected in this case -- can cut both ways and is therefore not dispositive of this case at this stage. This Court has in recent years recognized and approved significant encroachments on the libertarian ideal of property rights against "takings" claims. Property rights are acknowledged justly as not absolute, "for government could not exist if a citizen had the



"unfettered right to use property"
(Rochester Gas & Electric v. Public
Serv. Commn., 71 NY2d 313, 321;
see, 41 Kew Gardens Assoc. v.
Tyburski, 70 NY2d 325; Jackson v.
NY Urban Development Corp., 67 NY2d
400; Benson Realty Corp. v. Beame,
50 NY2d 994; Penn Cent. Transp. Co.
v. New York City, 42 NY2d 324,
aff'd 438 US 104). These
illustrative contrary precedents
sink or at least submerge the logic
and absolutist constitutional
taking analysis advanced to support
a reversal in this case.

In the late 1960's, New York
City enacted a policy of utilizing
tax abatements to encourage the
destruction of SRO's as substandard
housing. When the staggering
impact on the homeless population



was realized, the City adjusted its policy, recognizing SRO shelter to be a significant component to the preservation of an affordable housing stock (see, Blackburn, Single Room Occupancy in New York City, at 6-7). This Court only recently upheld the 1982 repeal of a tax abatement incentives against a Fifth Amendment due process claim by a property owner (Matter of Replan Dev. v. Dept. of Housing Preservation and Development of the City of New York, 70 NY2d 451). We noted, with pertinency here, that "the amendment evidences the Legislature's attempt to preserve what had become recognized as an important but rapidly disappearing source of low-income housing by eliminating the tax incentive to

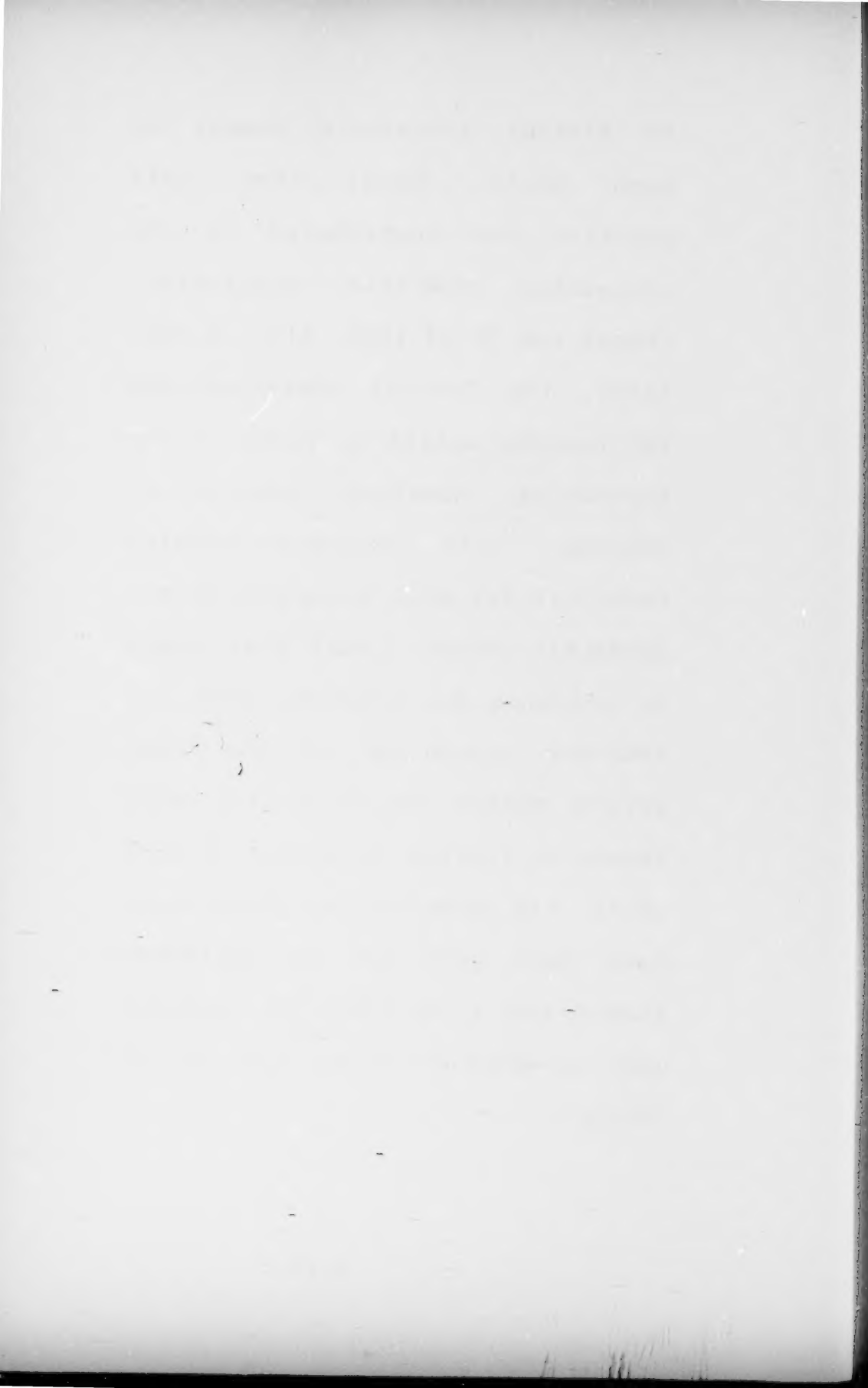


convert SRO's" (id., at 454-5; see also, Benson Realty Corp. v. Beame, 50 NY2d 994, supra).

The repeal of the tax abatements could not alone stanch the decline in the number of SRO units. Responding to the continued trend, the City passed the first SRO moratorium law, a predecessor to Local Law 9, on City Council findings "that a serious public emergency exists * * * caused by the loss of single room occupancy dwelling units housing lower income persons" (Local Law 59 of 1985, §1). In extending the moratorium in 1986, the City Council added "that there has been widespread withdrawal of single room occupancy dwelling units from the rental market, which has further reduced



an already inadequate supply of such units, [and] that this practice has contributed to the increasing homeless population" (Local Law 22 of 1986, §1). A year later, the Council addressed the SRO housing crisis in terms of the increasing homeless population, stating "that adequate housing resources for such occupants do not currently exist; [and] that there is evidence to conclude that the ordinary operation of the real estate market in this city will result in further reduction of such units and that units which have been lost will not be replaced" (Local Law 1 of 1987, §1, amended and re-enacted Local Law 9 of 1987).



Local Law 9 (Administrative Code of the City of New York, §27-198.2) builds on these emergency legislative initiatives and establishes a renewable five-year moratorium on the demolition or conversion of SRO units. Owners must make SRO dwelling units habitable, may not warehouse them, and must rent them to bona fide tenants (Administrative Code §27-2151[a]). Owners may avoid application of the law by showing hardship, buying out or replacing the units (Administrative Code §27-198.2[d][4]). The replacement provision allows demolition or conversion if new units are created through construction, rehabilitation or by buying an



existing multiple dwelling. The hardship exemption applies if the property will not produce a reasonable rate of return and the replacement exemption would substantially impair the feasibility of redeveloping the property. A reasonable rate of return is defined as an annual profit equal to 8 1/2% of the assessed value of the property. Another ultimate effort at legislatively balancing the respective rights of owners with the critical public interest in low and moderate housing needs allows an owner to obtain an exemption from the Local Law, by exercising a buy out of units subject to the moratorium. the \$45,000 buy out

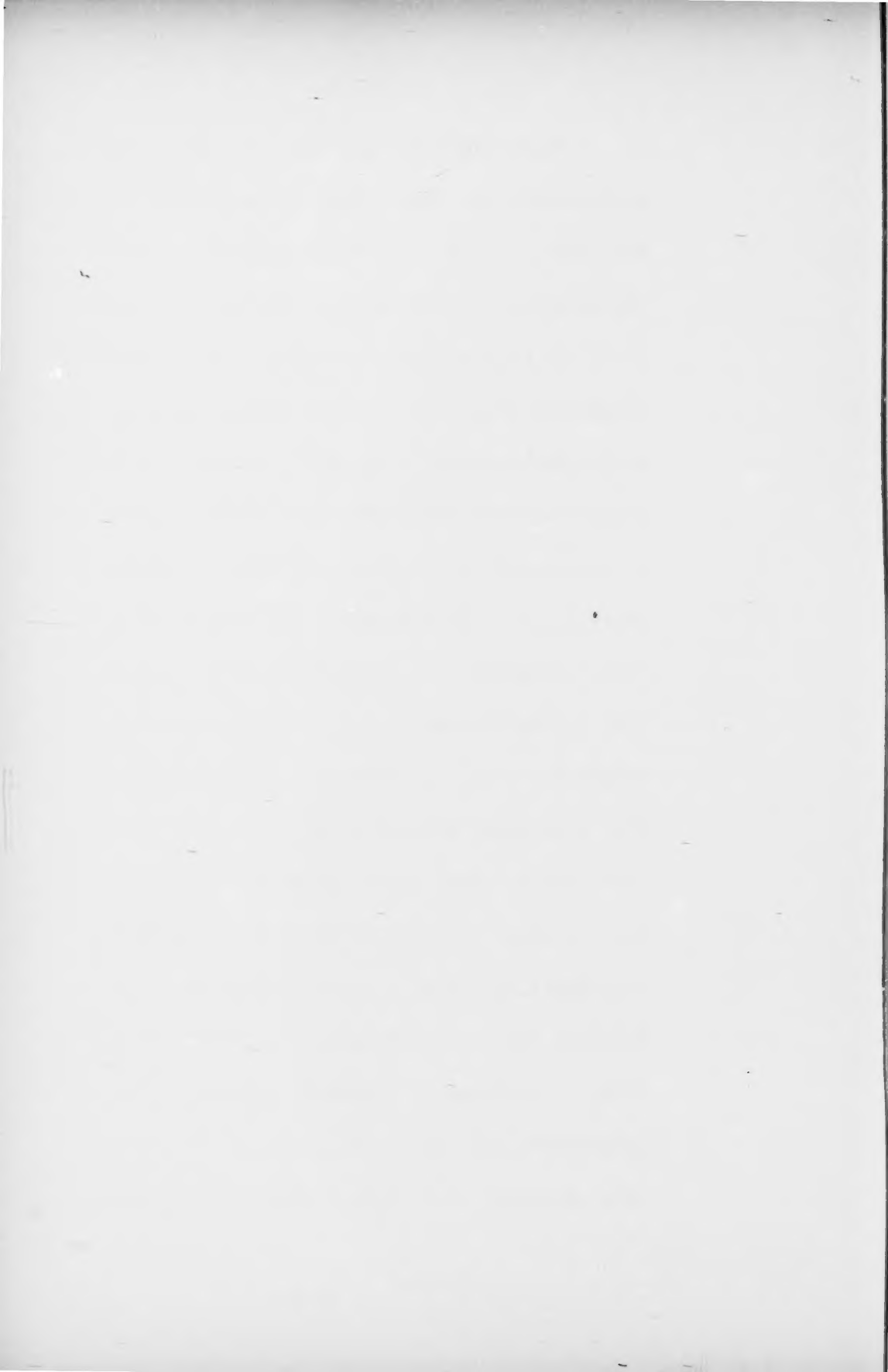


money must be used to provide substitutive affordable housing.

The rebellion against this careful legislative calibration, and against the Supreme Court and our own Court's admonitions that constitutional takings claims should be resolved on a singularly analyzed, as-applied basis with concrete factual settings, is untenable (see, Pennell v. City of San Jose, 485 US 1, ___, 108 S Ct 849, 857; Rochester Gas & Electric v. Public Serv. Commn., 71 NY2d 313, 324, supra). The Court should not sweepingly hold that the SRO moratorium law produces both a regulatory and a per se physical taking, facially violative of the United States Constitution.



Enactments of a local law pursuant to New York Constitution Article IX, §2[c],[10] and Municipal Home Rule Law §10[1][ii][a][12] enjoy a full presumption of constitutionality. A challenger must prove the legislation unconstitutional beyond a reasonable doubt (41 Kew Gardens Assoc. v. Tyburski, 70 NY2d 325, 333, supra). Additionally, when the challenge is to economic legislation, "modern substantive due process principles require that the judiciary give great deference to the [legislative body]" (Rochester Gas and Electric v. Public Serv. Commn., 71 NY2d 313, 320, citing, Exxon Corp. v. Governor of Md., 437 US 117, 124, reh denied sub nom. Shell Oil Co.



v. Governor of Md., 439 US 884;
see, Lincoln Federal Labor Union v.
Northwestern Iron and Metal Co.,
335 US 525; West Coast Hotel v.
Parrish, 300 US 379; Tribe,
American Constitutional Law [2d
ed], at 581).

Statutes undergoing
constitutional challenge as
facially invalid in a takings
context enjoy even greater
deference because there is "an
important distinction between a
claim that the mere enactment of a
statute constitutes a taking and a
claim that the particular impact of
government action on a specific
piece of property requires the
payment of just compensation"
(Keystone Bituminous Coal Assn. v.
DeBenedictis, 480 US 470, 494).

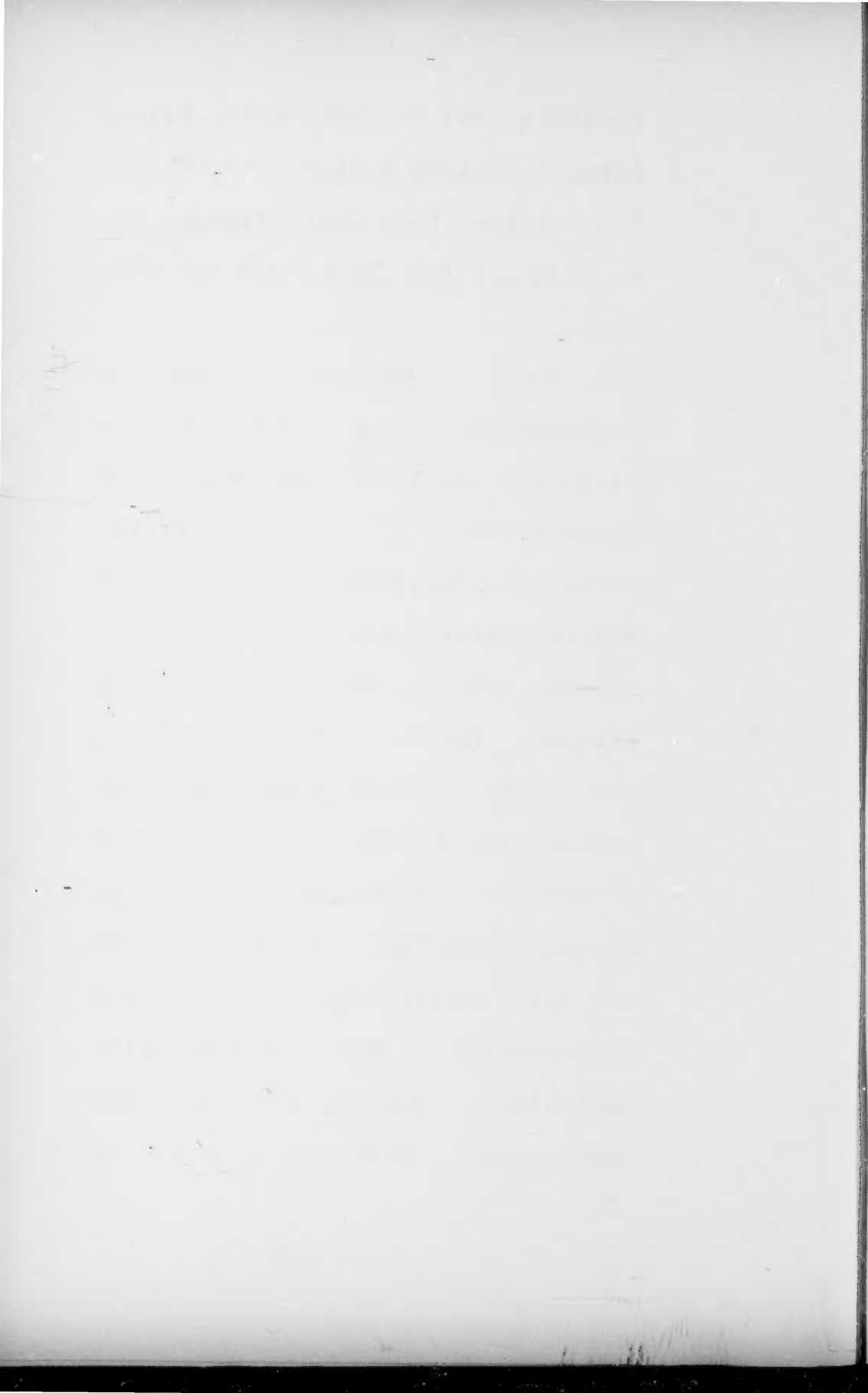


The Supreme Court routinely rejects preenforcement taking challenges -- conceptually and functionally equivalent to facial attacks -- to the constitutionality of legislative enactments. Relevantly and bluntly, that Court recently rejected a facial challenge to a rent control law, stating: "we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary' " (Pennell v. City of San Jose, 485 US 1, ___, 108 S Ct 849, 856, supra, quoting Hodel v. Virginia Surface Mining & Reclamation Assn, Inc., 452 US 264, 294-295; see also, Ruckelshaus v.



Monsanto, 467 US 986, 1005; Kaiser Aetna v. United States, 444 US 164, 175, citing, Penn Cent. Transp. Co. v. City of New York, 438 US 104, 124).

The Supreme Court's "admonition" is particularly pertinent in this case where the declaration of facial unconstitutionality is overinclusive and rooted in a record devoid of specific and relevant facts. The conclusion that the anti-warehousing and rental provisions are a forced occupation, effecting a per se physical taking, contradicts the way high courts have treated their functionally and conceptually equivalent rent control and regulatory statutes -- by



repeatedly finding them constitutional, at least facially (see, Pennell v. City of San Jose, 485 US 1, 108 S Ct 849, supra; Benson Realty Corp. v. Beame, 50 NY2d 994, supra; see also, Nollan v. California Coastal Commn., 483 US 825; Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419). This contrary holding negates an as-applied analysis which could support findings in appropriate cases that some SRO's are currently being operated at their highest and best use, thus suffering no economic disadvantage under the law; or that, by reason of the hardship provision, may never be subject to the moratorium. There is no way of knowing on this record the extent to which landlords are



economically affected or how profitable the dwelling units might be. Facial constitutional annihilation in such circumstances is a disproportionate remedy.

The majority's footnote 13 misinterprets what is traditionally referred to as a "facial" challenge and, as such, fails to contend with a real deficiency in its analysis. A facial challenge is an argument that concludes that the law at issue is a taking in all its applications, as to every property within the law's ambit. Of course there have been pre-enforcement challenges to laws as regulatory takings as applied to a particular owner's property, but the majority does not identify even one case that has held that a statute, in



all its applications, as to every piece of property affected by the law, works a regulatory taking because it frustrates the planned use for a piece of property. It does not explain how it can hold that the SRO law works a taking wherever the law applies. Yet, the majority concludes that the SRO law is a taking because it subjects properties to a use that owners "neither planned or desired" (slip opn at p. 11). Simply put, the court is without any means in this case to know what every SRO owner "planned or desired."

Another serious consequence overlooked by the majority is that its facial decree disproportionately demolishes a legislative structure designed to

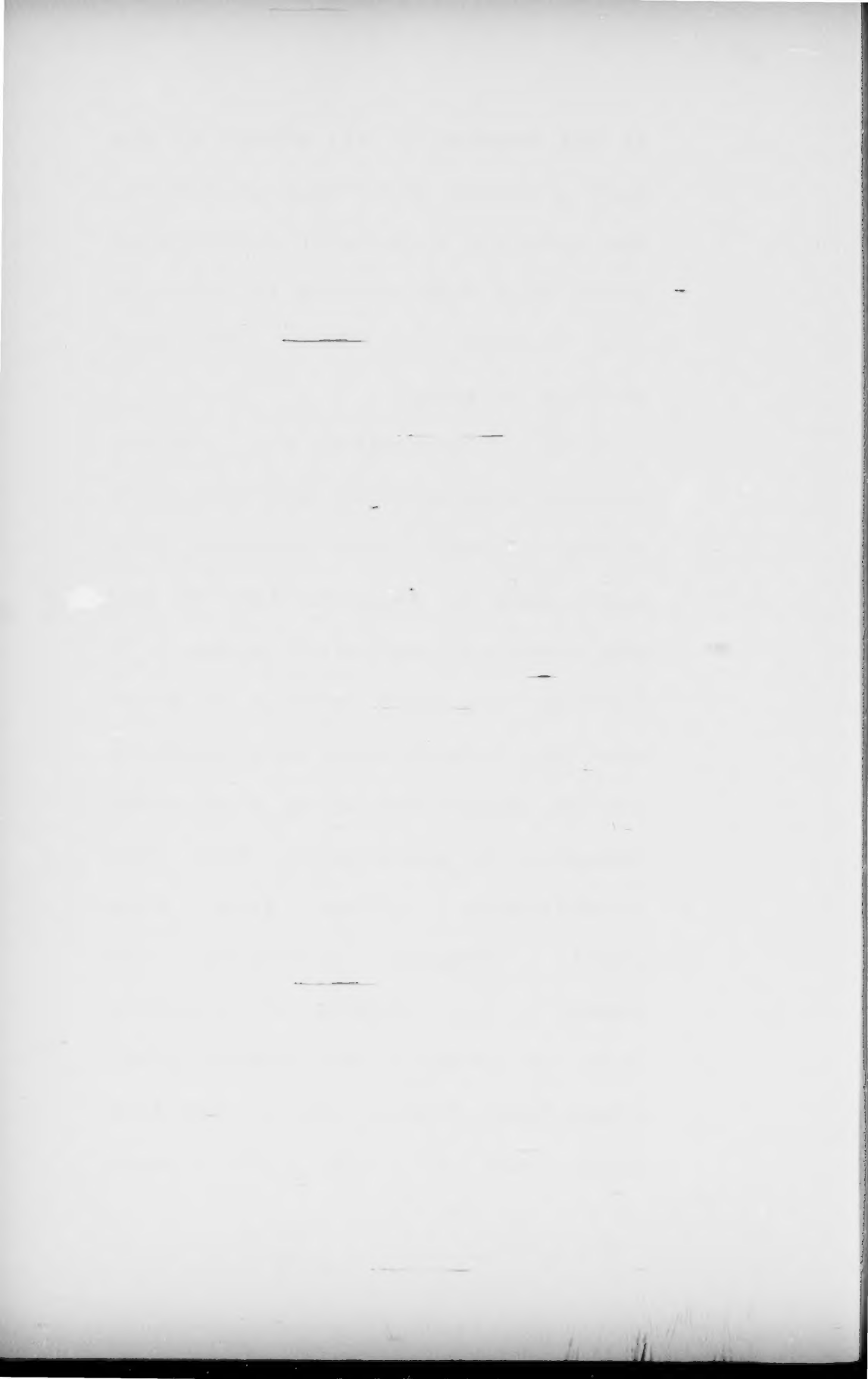


protect those in dire need. It thus legally positions the property owners to seek proportionate "just compensation" from the municipality daring to take, even temporarily, their properties and depriving them of their preferred uses (First English Evangelical Lutheran Church v. County of Los Angeles, 482 US 304, 321; see, Loretto v. Teleprompter Manhattan CATV, 58 NY2d 143, 149, 153, on remand from 458 US 419, supra; see also, Peterson, Land Use Regulatory "Takings" Revisited: The New York Supreme Court Approaches, 39 Hastings Law Journal, 335, 337). Thus, ironically, instead of a tax and services burden being shared somewhat equally, one class of property owners may reap a windfall



at the expense of all others by the most plenary threshold mechanism. The majority's decision compensates those from whom nothing is taken at the expense of those who have nothing to give.

In substantive due process inverse condemnation analysis, two distinct tests have evolved; one applicable to physical takings and the other to regulatory types. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (Penn Cent. Transp. Co. v. New York City, 438 US 104, 124, supra



[citations omitted]). Physical invasion cases are special because of the nature and quality of the governmental intrusion on a private party's property rights. A simple bright line rule applies: "any permanent physical occupation is a taking" (Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 432, supra [emphasis added]). "[W]hen the 'character of the government action' is a permanent physical occupation of property [the Supreme Court's] cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner" (id., at 434-435 [emphasis added,



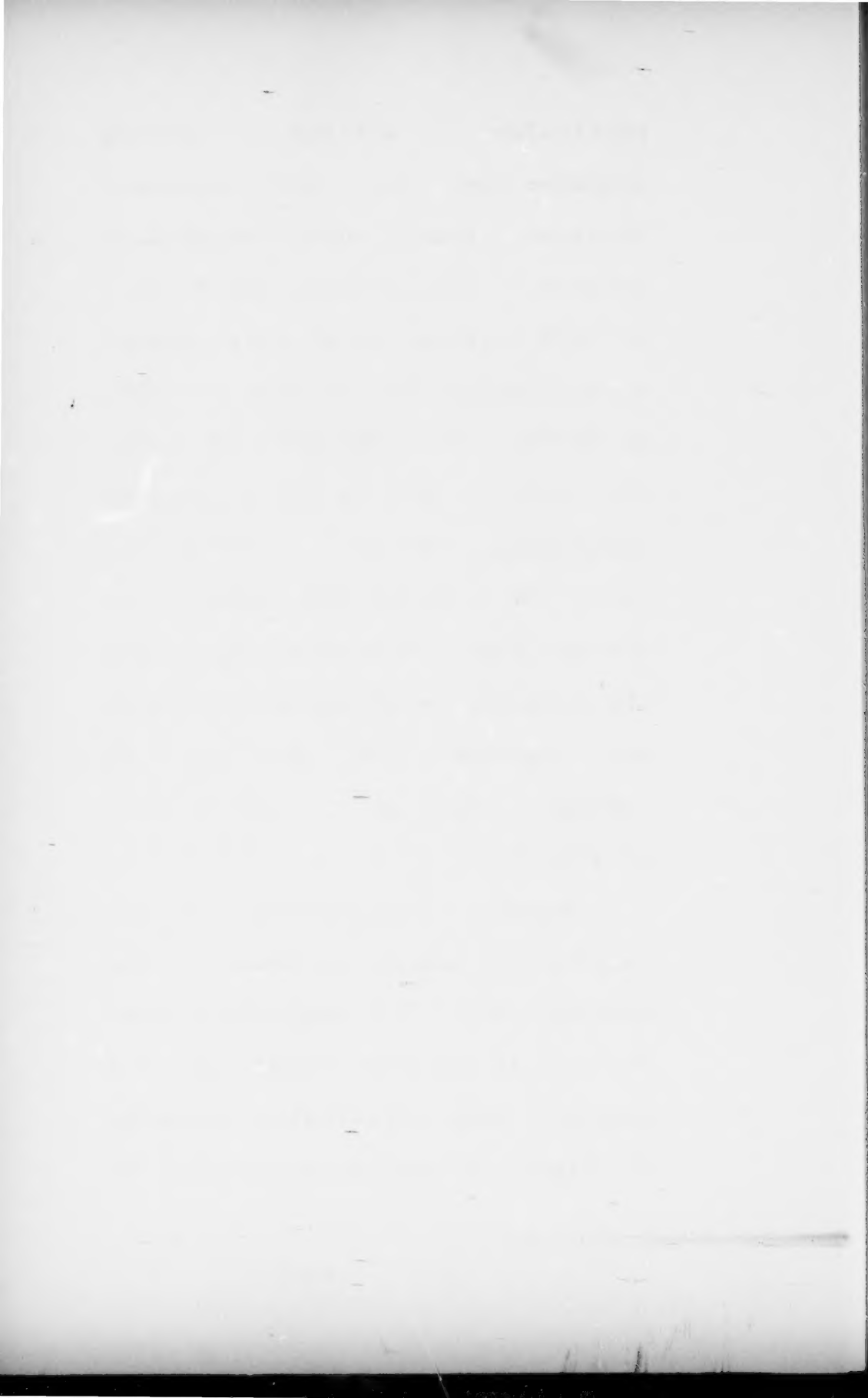
citations omitted]; Nollan v. California Coastal Commn., 483 US 825, 831, supra; Kaiser Aetna v. United States, 444 US 164, 180, supra).

The moratorium law at issue does not effect a physical taking because on its face it is not permanent in its individual application or in its limited five year duration. As the Supreme Court reminded in Pennell (485 US 1, ___, 108 S. Ct. 849, 857, fn 6, supra), "We stated in Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982), that we have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in



particular without paying compensation for all economic injuries that such regulation entails.' Id., at 440, 102 S. Ct., at 3178 (citing, inter alia, Bowles v. Willingham, 321 US 503, 517-518, 64 S. Ct. 641, 648-649, 88 L.Ed. 892 (1944)). And in FCC v. Florida Power Corp., 480 US ___, 107 S. Ct. 1107, 94 L.Ed.2d 282 (1987), we stated that 'statutes regulating the economic relations of landlords and tenants are not per se takings.' Id., at ___, 107 S. Ct., at 1112."

Equally inapplicable is the regulatory taking approach. The concept that "if regulation goes too far it will be recognized as a taking," now universally accepted in light of modern principles of



substantive due process, was accompanied, even in its embryonic stage, with guidelines particularly resonant here:

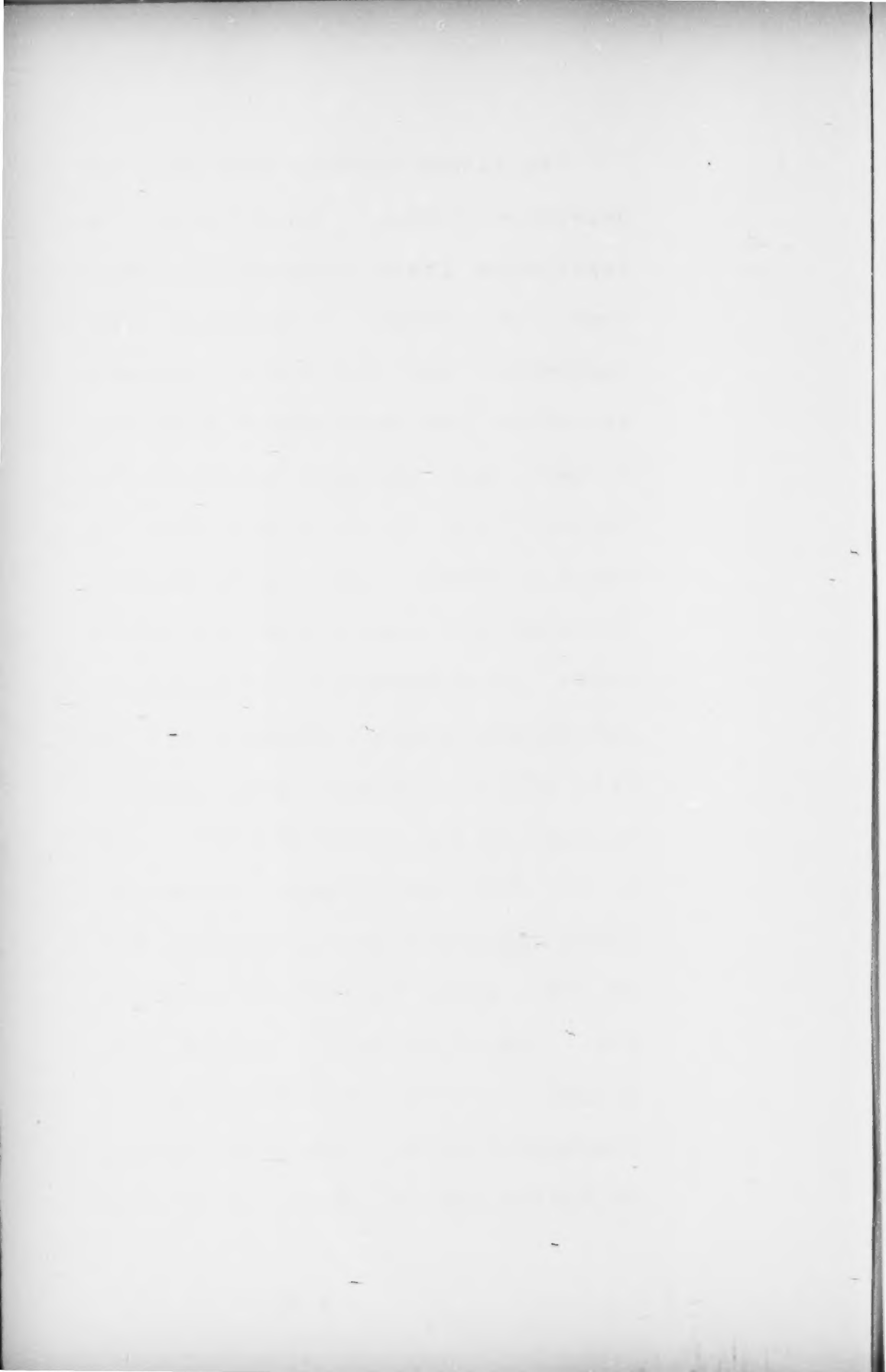
Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts (Pennsylvania Coal Co. v. Mahon, 260 US 393, 413, 415 [Holmes, J.]).



Three important elements from this passage have evolved to become integral parts of regulatory taking analysis: claims should be resolved on concrete facts; the property regulation should substantially advance a legitimate governmental interest; and the owner should not be denied economically viable use of the regulated property (see, Nollan v. California Coastal Commn., 483 US 825, 834, supra; Agins v. Tiburon, 447 US 255, 260; Penn Cent. Transp. Co. v. New York City, 438 US 104, 124, 127, supra; see also, Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings Law Journal 335, 339-351, supra).



No litmus test is available to determine what constitutes a legitimate state interest or what type of nexus " 'between the regulation and the state interest satisfies the requirement that the former' substantially advance the latter," but it is clear that "a broad range of governmental purposes and regulations satisfies these requirements" (Nollan v. California Coastal Commn., 483 US 825, 834-835, supra; see, Pennell v. City of San Jose, 485 US 1, 108 S Ct 849 [affordable housing], supra; Ruckelshaus v. Monsanto, 467 US 986, supra [pesticide research and registration]; Andrus v. Allard, 444 US 51 [protection of endangered birds]; see also, Matter of Replan Dev. v. Dept. of Housing



Preservation and Development, 70 NY2d 451, supra [preservation SRO housing stock]; Benson Realty Corp. v. Beame, 50 NY2d 994, supra [stable stock of affordable housing]). As long as the law has an identifiable public character, the means by which it is attained is for the legislative body to determine, not the Courts (Ruckelshaus v. Monsanto, 467 US 986, 1014, supra).

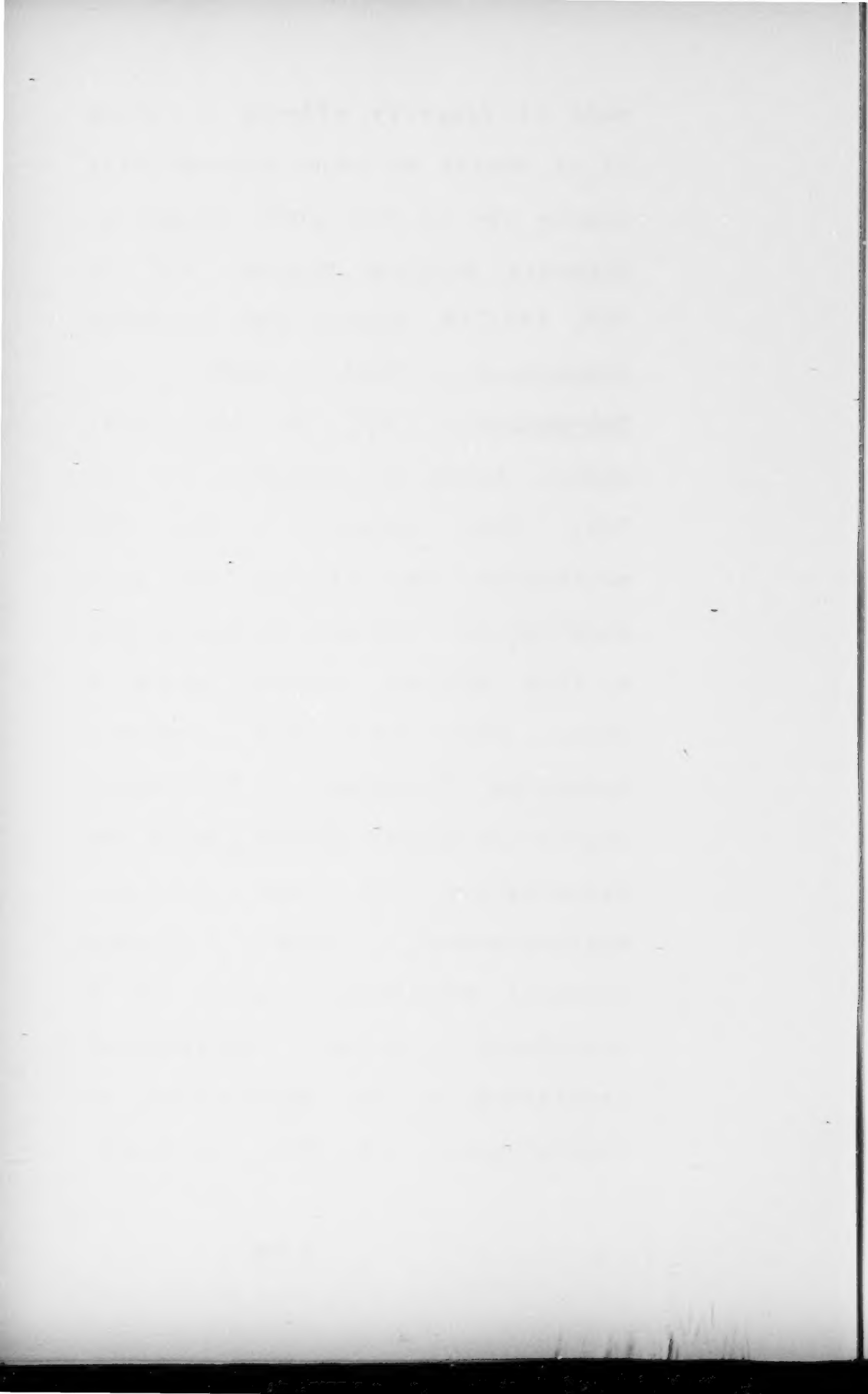
There is no disagreement that Local Law 9 is of the "greatest societal purpose" because it cannot be seriously disputed that preserving SRO housing stock and stanching the growing ranks of the City's shelter-less population is a legitimate governmental interest of the highest, most critical order

(see, Matter of Replan Dev. v. Dept. of Housing Preservation and Development of the City of New York, 70 NY2d 451, 454-455, supra).

The SRO moratorium applies a tourniquet to the loss of this part of the housing stock and substantially advances the City Council's expressed legislative interest of preserving these sheltering units and avoiding a further spillage of homeless into the City's street population.

When it is clear -- as in this case -- that a law substantially advances a self-evidently legitimate governmental interest, the test to be applied in considering a facial challenge is simplified: "[a] statute regulating the uses that can be

made of property effects a taking if it denies an owner economically viable use of his land" (Hodel v. Virginia Surface Mining, 452 US 264, 295-296, supra; see, Keystone Bituminous Coal Assn. v. DeBenedictis, 480 US 470, 495, supra; Agins v. Tiburon, 447 US 255, 260, supra). The SRO moratorium law effects no such deprivation. Indeed, it guarantees a fair minimum return, among a whole host of other economic balancing features. Government regulation almost always limits the maximization of the economic aggrandizement from private property ownership. Local Law 9 concededly places substantial restraints on the destruction or redevelopment of SRO buildings.



But I would find dispositive of this takings challenge that the law leaves the owners in possession and guarantees them a whole web of economic concessions or "give-backs," including the minimum profit of 8 1/2 percent of the assessed value of the property per year (see, Andrus v. Allard, 444 US 51, 65-66, supra).

Appellant owners and some amici argue nevertheless that properties could be put to more profitable uses if their destruction or redevelopment options were unimpeded. The simple answer to that proposition is that a property owner is not constitutionally guaranteed the most profitable use (Andrus v. Allard, supra; Penn Cent. Transp.



Co. v. New York City, 438 US 104, 125, supra). In determining whether regulations over property deprive the owner of the economically viable use of the land, we have required proof "by 'dollars and cents' evidence that under* no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of economic value, of the parcels must have been destroyed" (de St. Aubin v. Flacke, 68 NY2d 66, 77; see, Penn Cent. Transp. Co. v. City of New York, 42 NY2d 324, 329-331, aff'd 438 US 104, supra; French Investing Co. v. City of New York, 39 NY2d 587, 596, appeal dismissed 429 US 990). That standard can be



properly ventilated and applied only in administrative and judicial forums on an as-applied case record development -- not in an aerie perch on a facial review.

The loss of future profits argument also "provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property related interests" (Andrus v. Allard, 444 US 51, 66, supra). Insofar as the case presents a facial attack, there is absolutely no record basis against

which to determine whether the moratorium law interferes with distinct "investment-backed expectations" (see, Penn Cent. Transp. Co. v. New York City, 438 US 104, 124, supra).

Peripherally, the Court also decides today that one particular known person may not be ousted from his habitation because that would violate a legislated anti-eviction policy in a rent control situation (Braschi v. Stahl Associates, ___ NY2d ___ [slip opn, decided today]). To be sure, the statutes and the issues have some differences, but they have one essential feature in common: Local Law 9's genesis and purpose are founded in the identical social policy as the anti-eviction



regulation -- securing shelter for people -- only in the instant case the statute tries to protect the most disadvantaged members of our society who truly have nowhere else to go. The Court, contradictorily in my view, authorizes the expulsion of 52,000 people to allow, in the main, for commercial redevelopment of their former less-than-modest dwellings while keeping one known individual in his rent-controlled apartment. The decisional compass seems to be oscillating between opposite poles.

In sum, the Constitution, the authorities and the policies do not support the conclusion that the legislated emergency moratorium against the elimination of SRO dwelling units, societally critical



to the temporary preservation of some housing for low income persons, is a facially impermissible governmental taking, i.e., an inverse condemnation of property. The precedents of the Supreme Court and of our Court, properly applied and understood, do not warrant the grave judicial usurpation effected today in the declaration of facial unconstitutionality of an enactment by a duly elected democratic body -- a declaration which gives modern intonation to Judge Cardozo's disquieting observation that: "Judges march at times to pitiless conclusion under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They



perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the alter of regularity" (Cardozo, Growth of the Law, at 66).

* * * * *

Order reversed, with costs, Local Law No. 9 declared to be unconstitutional and defendants enjoined from implementing the Local Law's provisions. Opinion by Judge Hancock in which Judges Simons, Kaye, Alexander and Titone concur. Judge Bellacosa dissents and votes to affirm in an opinion in which Chief Judge Wachtler concurs.



Decided July 6, 1989



**DECISION OF THE APPELLATE DIVISION,
FIRST DEPARTMENT, DATED DECEMBER 1,
1988**

SEAWALL ASSOCIATES et al.,
Respondents, and 459 WEST 43RD
STREET CORP. et al.,
Respondents-Appellants, v. CITY OF
NEW YORK et al.,
Appellants-Respondents, and RICHARD
WILKERSON et al.,
Intervenors-Appellants. (Action No.
1)

EASTERN PORK PRODUCTS COMPANY et
al., Respondents-Appellants, v.
CITY OF NEW YORK et al.,
Appellants-Respondents. (Action No.
2.)

TESTAMENTUM, Respondent, v CITY OF
NEW YORK et al.,
Defendants-Appellants. (Action No.
3.)

First Department, December 1, 1988

SUMMARY

CROSS APPEALS from three
orders and judgments (three papers)
of the Supreme Court (David B.
Saxe, J.), entered March 16, 1988
in New York County, which, in
actions Nos. 1 and 3, declared
invalid various provisions of Local
Laws, 1987, No. 9 of the City of
New York, and enjoined the city
from implementing or enforcing said
provisions, and, in action No. 2,
granted the cross-motion of the



municipal defendants to dismiss the complaint.

Seawall Assocs. v. City of New York, 138 Misc 2d 96, reversed.

Eastern Pork Prods. Co. v. City of New York, 138 Misc 2d 96, affirmed.

Testamentum v. City of New York, 138 Misc 2d 96, reversed.

APPEARANCES OF COUNSEL

Nathan Dershowitz of counsel (Sheldon D. Camhy and George G. Nelson with him on the brief; Dershowitz & Eiger, P.C., and Shea & Gould, attorneys), for Seawall Associates, respondent.

Marvin L. Schwartz of counsel (Shapiro & Schwartz, attorneys) for Anbe Realty Co., respondent.

Philip H. Schaeffer of counsel (Jane D. Connolly and Steven Mairella with him on the brief; White & Case, attorneys), for 459 West 43rd Street Corp. and another, respondents-appellants in actions Nos. 1 and 2.

Gary M. Rosenberg of counsel (Franklin R. Kaiman and Theresa J. Hecker with him on the brief; Rosenberg & Estis, P.C., attorneys), for Sutton East Associates-86 and another, respondents-appellants.



Elizabeth Dvorkin (Leonard Koerner with her on the brief; Peter L. Zimroth, Corporation Counsel, attorney), for City of New York, appellants-respondents in actions Nos. 1 and 2 and defendants-appellants in action No. 3.

Saralee E. Evans of counsel (Norman Siegel, Wayne G. Hawley and Anne R. Teicher with her on the brief), for Richard Wilkerson and others, intervenors-appellants.

Virginia Shubert of counsel (Robert M. Hayes and Mitchell S. Bernard with her on the brief), for Coalition for the Homeless, intervenor-appellant.

Edmund J. Burns of counsel (Maria Scordia with him on the brief; Burns, Kennedy, Schilling & O'Shea, attorneys), for Testamentum, respondent.

Carol S. Keenan of counsel (Ruben Klein, P.C., and Ronald A. Zumbun, Edward J. Connor, Jr., and Timothy A. Bittle, attorneys), for Pacific Legal Foundation, amicus curiae.

OPINION OF THE COURT

Ross, J. P.

The issue in these consolidated actions is whether Local Laws, 1987, No. 9 of the City



of New York, which was approved March 5, 1987 and which, inter alia, provides for a five-year moratorium on the demolition or conversion of single room occupancy housing, is constitutional.

For more than 10 years, the governmental officials of the City of New York have been wrestling with the problems related to single room occupancy (SRO) housing.

An SRO has been defined as a living unit which shares a kitchen and/or bathroom with one or more other units (see, Blackburn, Single Room Occupancy in New York City [1986 report prepared for the City of New York Department of Housing, Preservation and Development]). SRO units are found in hotels, apartment buildings, and even



private homes. We "judicially notice" (Prink v. Rockefeller Center, 48 NY2d 309, 316-317 [1979]), as a matter of common knowledge, that for generations, SRO units have served as a relatively inexpensive form of shelter for persons of low and moderate income.

Over the past decade, two major factors have caused a significant decline in the number of SRO units available to the poor. First, upon the basis of adopting the widespread opinion that SRO units were "substandard" housing, the City adopted a policy of encouraging the demolition, and then redevelopment of the buildings containing such units. Second, due to the rapid rise in real estate

values in New York City, particularly in Manhattan, where 75% of the SRO units are located, many SRO owners found it more profitable to convert their buildings to commercial and other residential uses, rather than to continue to operate them as SROs.

Mr. Paul A. Crotty, Commissioner of the New York City Department of Housing Preservation and Development (HPD), in an affidavit, dated April 13, 1987, which was submitted in support of the city's position in the instant litigation, stated, in pertinent part: "Significant hardships and social costs have attended the decline in the number of SRO units. SRO residents have frequently been pressured to vacate units through



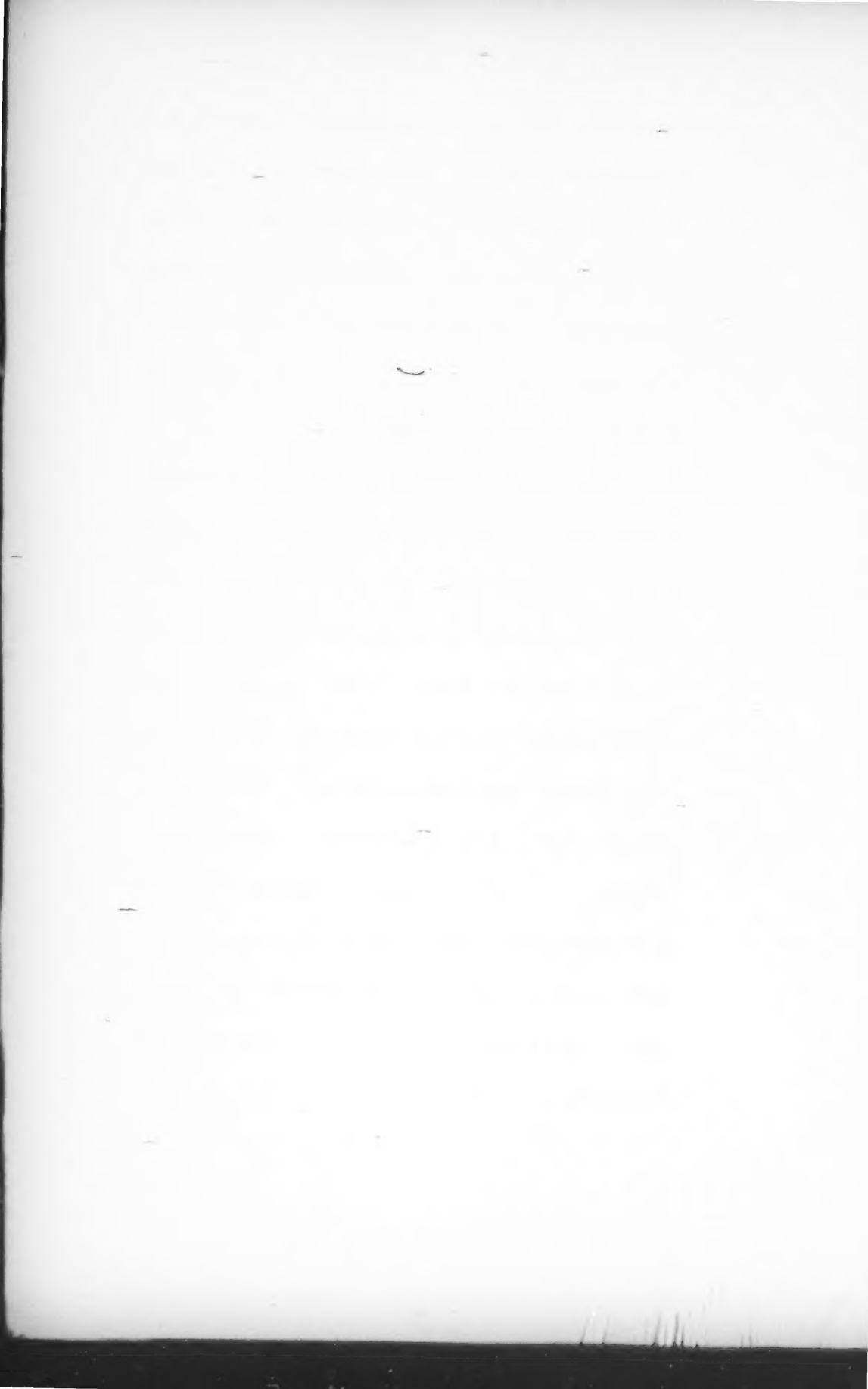
the use of threats, violence, reductions in essential services and other forms of harassment. The elderly, physically and mentally disabled and non-English speaking residents of SROs have been especially vulnerable to such tactics. Because of a severe shortage of lower cost housing in New York City, displaced SRO residents often find it difficult or impossible to find new housing.

* * * Moreover, there is substantial evidence that the displacement of SRO residents and the loss of these units has contributed to the City's growing homeless population. Providing shelter for the homeless has placed a significant strain on the City's resources. The City provides



shelter for a far greater number of homeless people than any other City in the county. Indeed, New York City currently houses as many homeless individuals in its shelters as it did at the height of the Great Depression."

As soon as the City government realized that SRO units were disappearing at an alarming rate from the city's housing stock, with the result that the number of affordable rental housing units for the poor was shrinking, the city abandoned its policy, mentioned supra, of encouraging the destruction and redevelopment of SRO units, and took steps to stop the decline in this form of housing.



In 1982, the city signalled its change in policy, by amending Administrative Code of the City of New York (Administrative Code) J51-2.5(i)(6) (now §11-243[i][6]), so as to eliminate the J51 property tax abatements for the conversion of SRO dwellings to other uses; and, the Court of Appeals in Matter of Replan Dev. v. Department of Hous. Preservation & Dev. (70 NY2d 451 [1987], appeal dismissed ___ US ___, 108 S Ct 1207 [1988]), held that legislation constitutional.

Subsequently, in an effort to discourage the harassment of SRO residents by owners, who were seeking to empty their buildings in order to make more profitable use of them, the City Council in 1982, enacted the Unlawful Eviction Law



(see, Local Laws, 1982, No. 56, of City of New York), and, funded the Special Housing Unit in the New York County District Attorney's Office, which specialized in the investigation and prosecution of corrupt landlords, who used unlawful means to drive SRO tenants out.

Thereafter, in 1983, for the purpose of slowing up efforts at alteration or demolition of SRO properties, the Council enacted Local Laws, 1983, No. 19, of the City of New York, which provided that the City Department of Buildings could not issue a permit for the alteration or demolition of an SRO building, unless the Commissioner of HPD certified that there had been no harassment of the



residents of such a building during the previous 36 months. Furthermore, this law states, if HPD certification is denied, then the Department of Buildings is prohibited (see, Administrative Code § 27-198) from issuing this type of permit for a period of 36 months from the date of the denial of the certification. This regulatory scheme was sustained, after a Federal constitutional challenge, in Sadowsky v. City of New York (732 F2d 312 [2d Cir 1984]).

When the enactment of the laws, discussed supra, did not stem the decline in the number of SRO units, the Council enacted Local Laws, 1985, No. 59, of the City of New York. In enacting this law the



Council declared that it had found "a serious public emergency exists * * * created by the loss of single room occupancy units housing lower income persons" (see, Local Law No. 59, § 1). The purpose of this law was to maintain the status quo, while the city reformulated its policy of dealing with the SRO problem. Our examination of Local Law No. 59 indicates that it, in substance, placed an 18-month moratorium, retroactive to January 9, 1985, on the demolition or conversion of most categories of SRO properties, and mandated a study of SRO housing.

Mr. Anthony J. Blackburn, as project director, conducted the mandated study. In 1986, he issued to the HPD a report, which was



prepared by Urban System Research & Engineering, Inc., and entitled: SINGLE ROOM OCCUPANCY IN NEW YORK CITY.

Review of the Blackburn study by us indicates it found that the number of SROs was diminishing, SROs house a predominantly poor population, and for SRO tenants, there are no housing alternatives. Furthermore, in substance, the study recommended a major effort by the city to preserve SROs, owners of SROs should be allowed to demolish them, as long as they replace the units in some other location, and the needs of SRO tenants would be better served if the landlords of SROs were not-for-profit corporations.



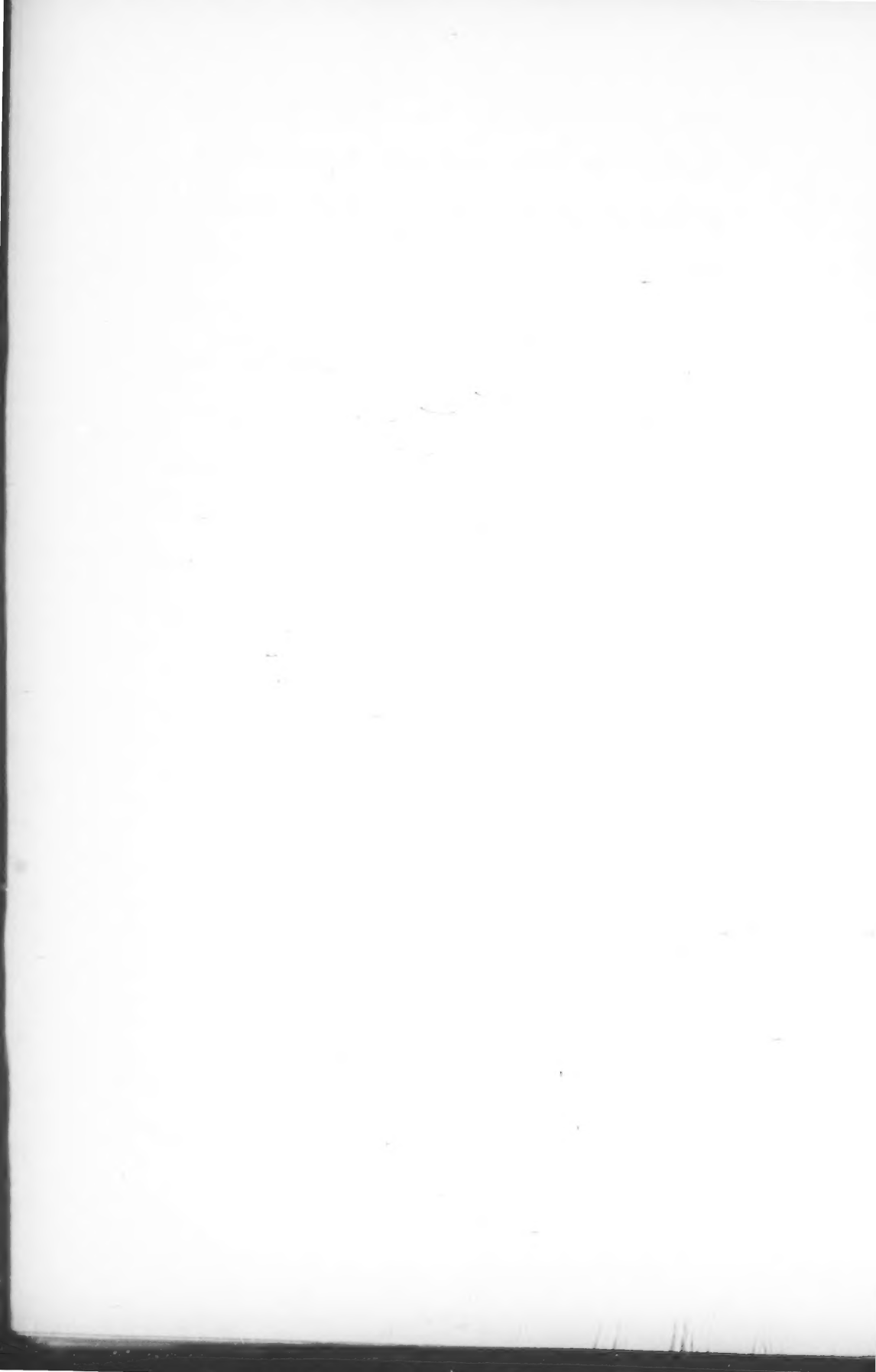
Before city officials had finished evaluating the Blackburn study, and formulating a new SRO housing plan, the moratorium, established by Local Law No. 59, expired on July 9, 1986. Therefore, the Council enacted Local Laws, 1986, No. 22 of the City of New York, which extended the moratorium on demolition or conversion of SROs to December 31, 1986. Local Law No. 22 also banned "warehousing," by requiring SRO owners to maintain the units in habitable condition and, to make a good-faith effort to rent them. Additionally, if an SRO unit was not occupied by a bona fide tenant for a period of 30 days or longer, this law created a rebuttable presumption that the SRO landlord



was in violation and, for each such unit, the landlord was subjected to a statutory penalty of \$500, plus a daily fine of \$250. Moreover, this law exempted largely vacant buildings from the moratorium and "antiwarehousing" provisions, either as of right, or by payment to a housing fund.

The constitutionality of Local Law No. 22 was challenged by Seawall Associates (Seawall), 459 West 43rd Street Corporation (459 West), Eastern Pork Products Company (Eastern), Sutton East Associates-86 (Sutton East), Channel Club and Anbe Realty Co. (Anbe Realty).

Seawall is a partnership, which is engaged in the business of acquiring and holding real property



in midtown Manhattan for development and sale. In October 1984, Seawall purchased several contiguous lots, in the block bounded by 33rd and 34th Streets and Eighth and Ninth Avenues. Included in this plot were old structures in poor condition, which had been operated by prior owners as SRO residential hotels. One of these buildings was half empty, a second was nearly vacant, and a third contained no tenants at all. The intention of Seawall is to demolish all of the buildings, and erect a commercial office building.

459 West is in the business of acquiring real estate for, inter alia, development and sale. On or about April 4, 1970, an affiliate of 459 West acquired "The



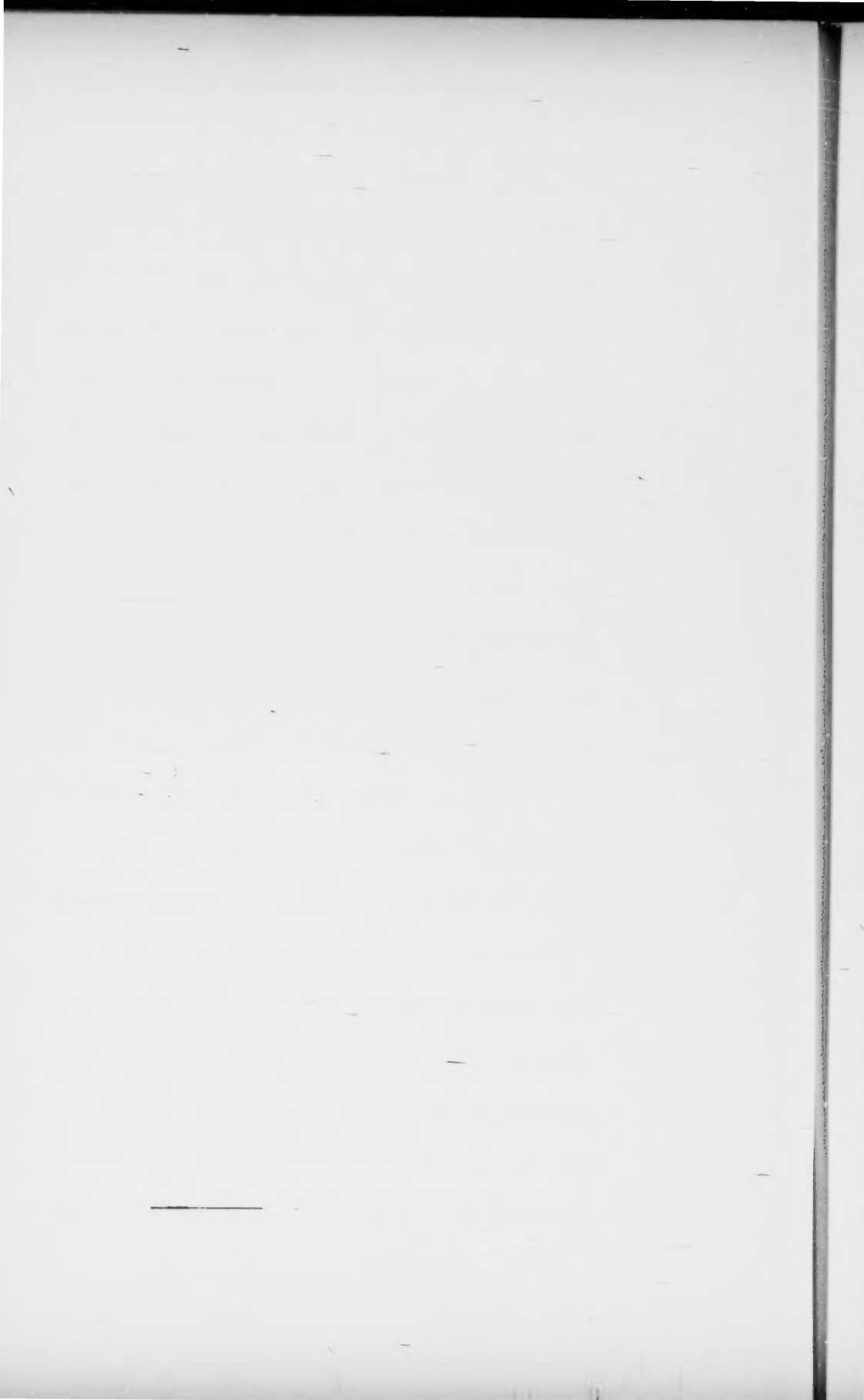
Diplomat," which was operated as a residential hotel, containing 216 SRO units. The Diplomat is located at 108 West 43rd Street, in New York County. By 1986, according to owner 459 West, 110 of the Diplomat's SRO units were vacant and uninhabitable. Unequivocally, 459 West states that it has no intention of offering any vacant SRO unit for occupancy, or to continue the tenancy of any tenants dwelling in the occupied SRO units, except as required by law.

Eastern is a partnership and, like 459 West, it is engaged in the business of acquiring real estate for the purposes of development and sale. Pursuant to a contract, made on or about May 1, 1986, Eastern purchased an SRO building located

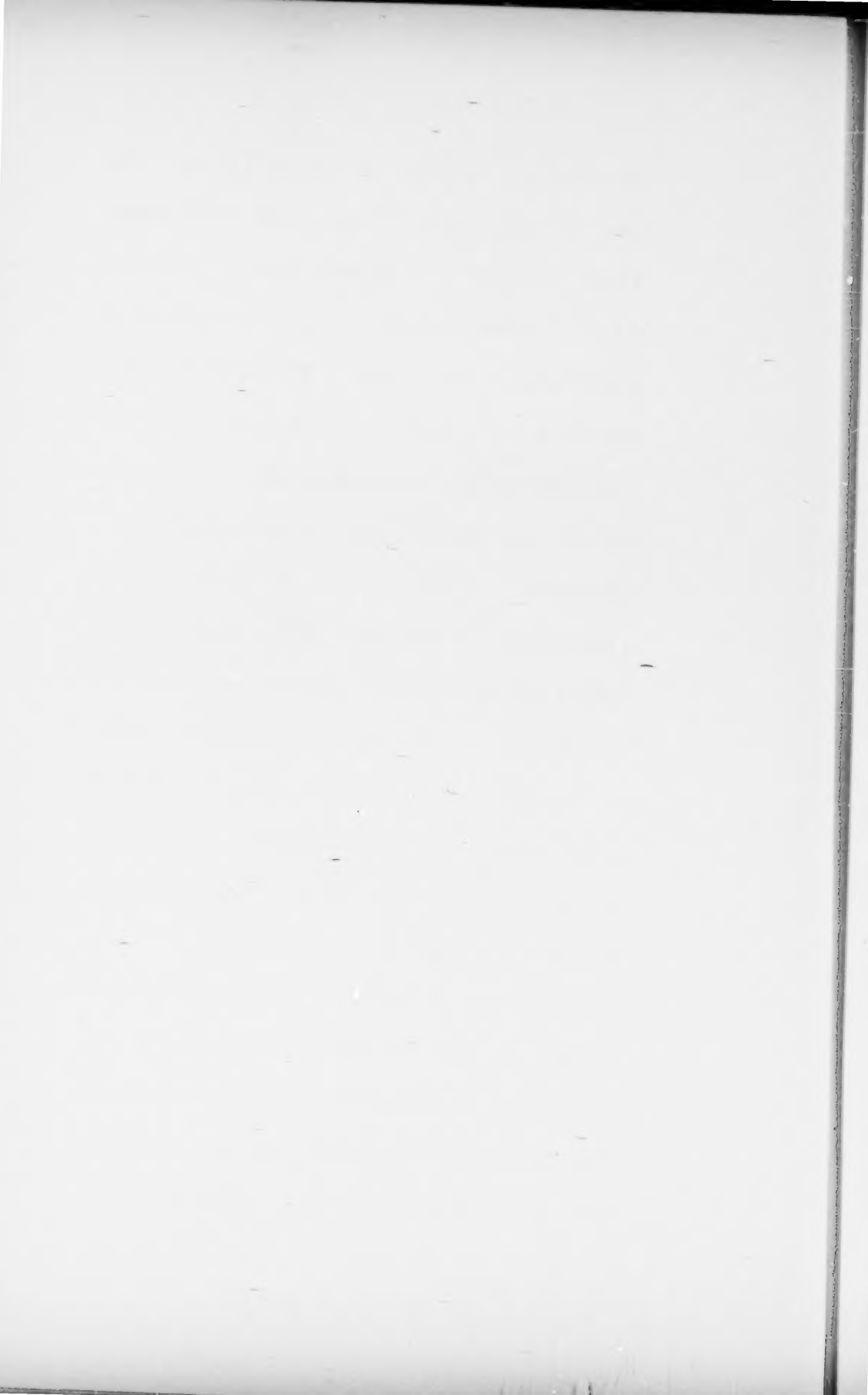


at 611 Ninth Avenue, New York County. This multiple dwelling contained 18 SRO units, of which 8 were occupied by tenants, 10 were vacant and uninhabitable. Unequivocally, Eastern, like 459 West, asserts that it has no intention of offering any vacant SRO unit for occupancy, or to continue the tenancy of any tenants dwelling in the occupied SRO units, except as required by law.

Sutton East, in January 1985, purchased the Gracie Square Hotel, located at 451 East 86th Street, in Manhattan. This hotel contained 31 SRO units, many of which had been vacant for some time. Approximately three months after it purchased that hotel, Sutton East purchased several parcels of



property, which were adjacent to the hotel, and located at 455 East 86th Street. Thereafter, Sutton East demolished the structures existing on the aforementioned parcels, and constructed a residential condominium building which is known as, and owned by, Channel Club. Sutton East complains that the SRO regulatory legislation has compelled it to maintain a dilapidated SRO hotel adjacent to the new luxury high-rise Channel Club, notwithstanding the fact that Sutton East allegedly has negotiated, without harassment, force or interruption of services, with the tenants for the good-faith surrender of possession of the SRO units. Furthermore, Sutton East

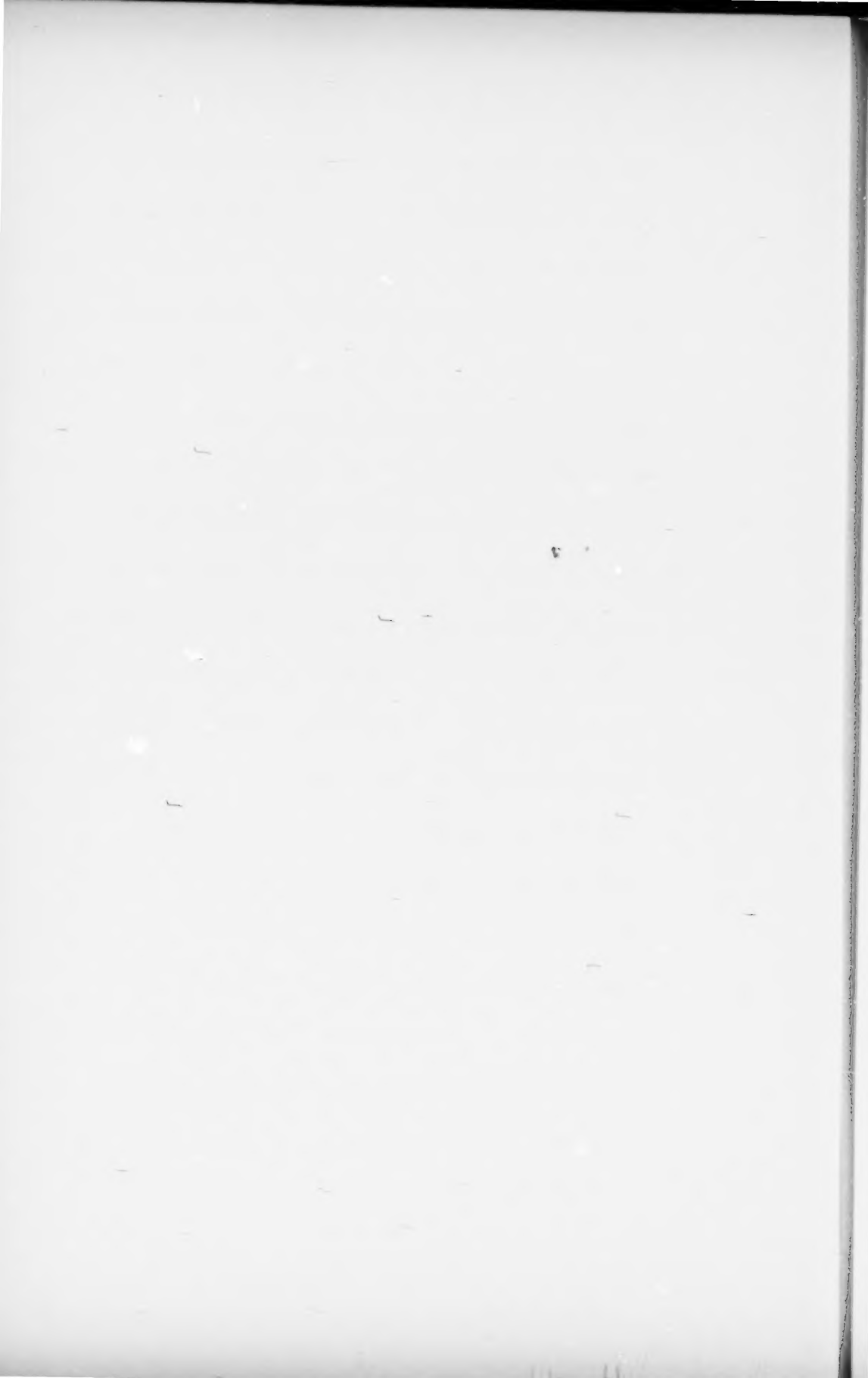


claims its purchase, for substantial consideration, of the hotel was part of an over-all plan to redevelop the hotel, consistent with the construction of the Channel Club.

Anbe Realty is a partnership. Since on or about 1969, Anbe Realty has been the registered owner and operator of a five-story building, which contains 29 SRO units, and which is located at 305 West 29th Street, in New York County. Subsequently, by the spring of 1985, before the enactment of Local Laws, 1986, No. 22, but during the Council's consideration of Local Laws, 1985, No. 59, which was the 18-month moratorium legislation, discussed supra, Anbe Realty had succeeded in emptying that building



of its SRO tenants, as a result of two years of legitimate negotiations with the tenants, attrition, and lawful dispossession proceedings. As evidence of its good-faith efforts, Anbe offered a certificate of no harassment issued by the HPD, which is dated March 22, 1985. Following the receipt of this certificate, Anbe Realty, at substantial expense, engaged architects, engineers and other professionals to prepare and file building plans to convert the now empty building into a class A multiple dwelling with 11 self-contained units, and on July 19, 1985, the City Department of Buildings issued a building permit to Anbe Realty. Due to the enactment of Local Laws, 1985, No.



59, which, as mentioned supra, made the moratorium legislation retroactive to January 9, 1985, Anbe's conversion plans were halted, and its building permit was revoked.

Plaintiffs Seawall, Eastern, 459 West, Sutton East and Anbe Realty, in 1986, separately commenced actions, which were consolidated under index number 20891 of 1986, against the city. The complaints of these five plaintiffs, in substance, sought to permanently enjoin the city from enforcing Local Laws, 1986, No. 22 against them, upon the grounds that the law was unconstitutional, since it allegedly violated the "Taking" Clauses of the US and NY Constitutions, which prohibit the



taking of property without due process and just compensation, the Council exceeded its constitutionally granted legislative authority by enacting a law, which conflicted with New York State law, and the law did not comply with the State Environmental Quality Review Act (SEQRA), the City Environmental Quality Review (CEQR), and the Environmental Conservation Law (ECL). Thereafter, by order, Supreme Court, New York County, filed February 20, 1987, the IAS court, in substance, declared invalid the antiwarehousing part of Local Law No. 22, which imposed the affirmative obligations on plaintiffs to rehabilitate all their vacant SRO units and to rent



them to bona fide tenants, and enjoined the city from enforcing those provisions.

The City did not perfect an appeal from the February 20, 1987 order of the IAS court, since Local Laws, 1987, No. 1, which altered the provisions of Local Laws, 1986, No. 22 had already been enacted into law, and, as a result, in the city's opinion that appeal had become moot.

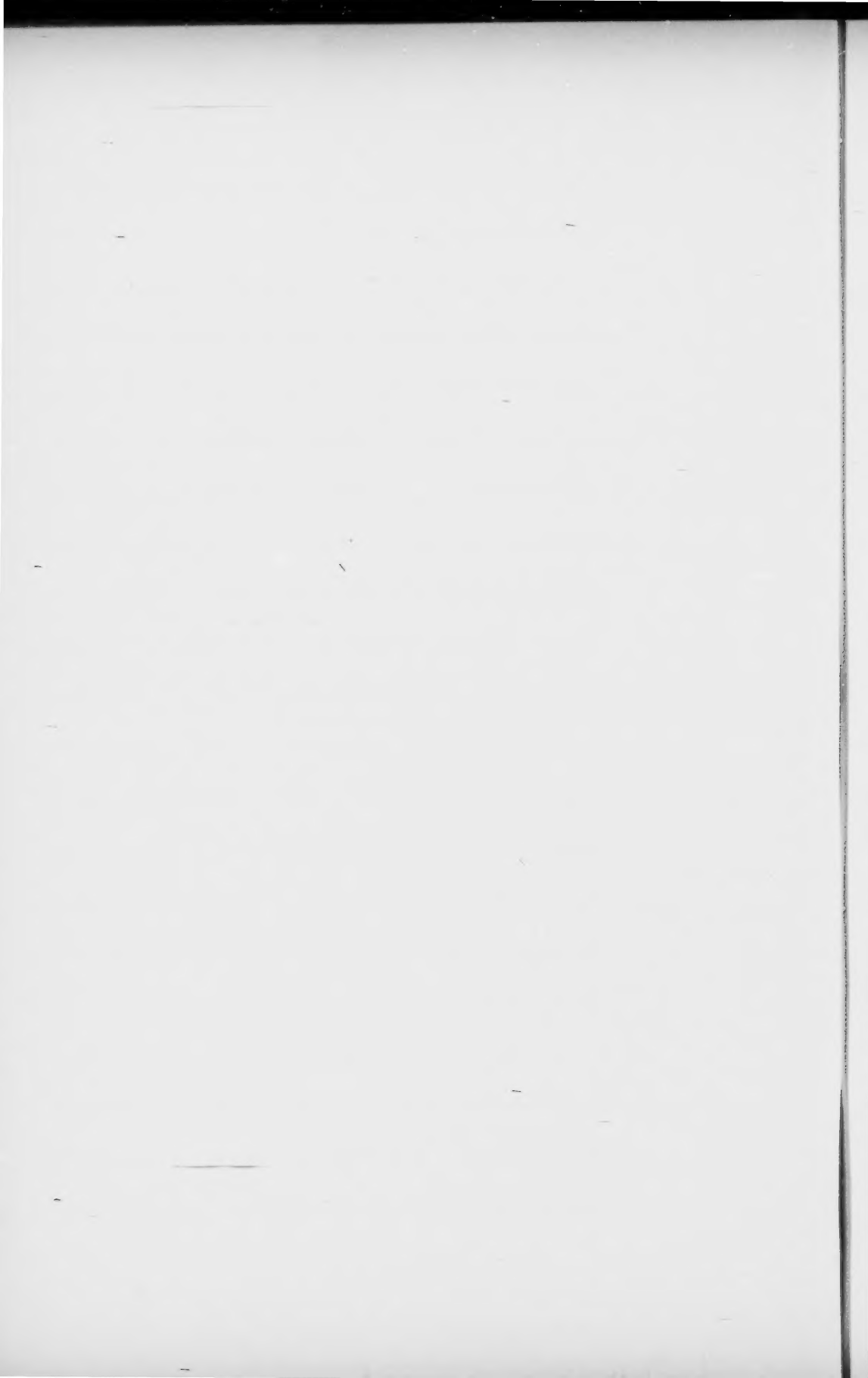
While Local Laws, 1986, No. 22 was in effect, the HPD finished its review of the Blackburn study, discussed supra, and the result was the first comprehensive city SRO legislation, which was Local Laws, 1987, No. 1, and that law was subsequently amended, and reenacted



by the Council, on March 5, 1987,
as Local Law No. 9.

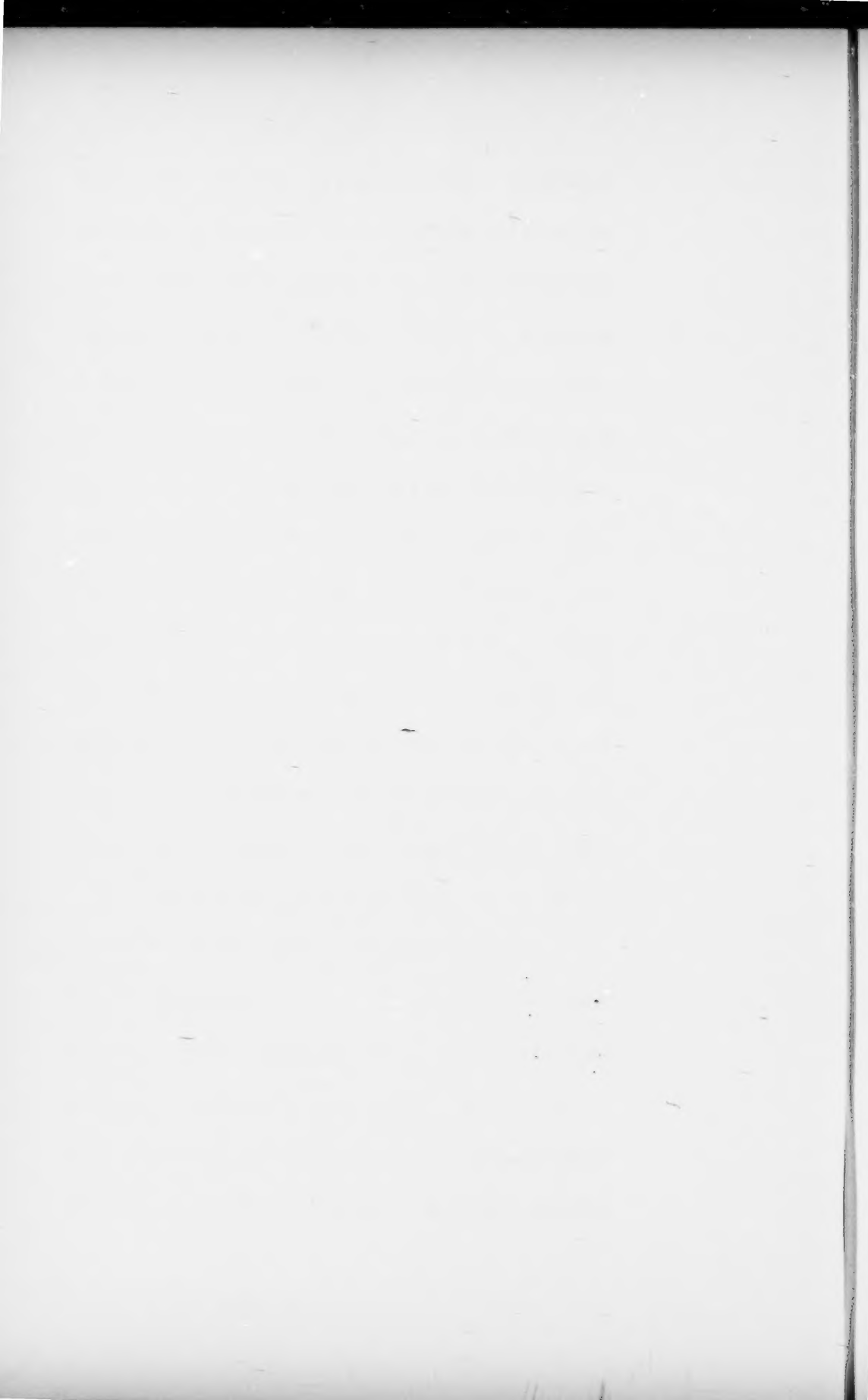
This law establishes a five-year moratorium on conversion, alteration and, demolition of SRO units (see, Administrative Code § 27-198.2), and requires SRO owners to maintain their units in a habitable condition and make a good-faith effort to rent them (see, Administrative Code §§27-2150--27-2152). If an SRO owner violates the provisions, mentioned supra, he or she is subject to civil penalties (see, Administrative Code §27-198.2[g]; §27-2152[e])).

Our examination of the law indicates its intent is to preserve and make available existing SRO housing. Therefore, the law



exempts buildings, which do not actually offer such housing, and an example is a building that has been vacant for some time (see, Administrative Code § 27-198.2 [d][1][b]), and also exempted are buildings which are not subject to the market forces that encourage the demolition and conversion of SROs, such as government-owned buildings, and buildings which are part of an approved project for the rehabilitation and preservation of SRO dwellings (see, Administrative Code § 27-198.2[b][1][d],[g]).

Furthermore, the law allows SRO owners the option of withdrawing protected SRO units from the housing market, upon providing for the replacement of those units (see, Administrative



Code § 27-198.2 [d][4][a])). A unit may be exempted from the law following payment to an SRO Housing Development Fund Company (Fund) of an amount equal to the cost, which has been currently set at \$45,000, of creating a replacement unit. The funds contributed are to be used to preserve, acquire, and develop housing affordable by low- and moderate-income persons. Alternatively, actual replacement units may be provided by acquiring an existing multiple dwelling, constructing a new multiple dwelling, or rehabilitating an existing dwelling unit. Replacement units are to be sold or leased to a not-for-profit organization for operation. Since Fund contributions may not result



in immediately available alternative units, where 50% or more of the SRO units in a building are occupied, an owner may obtain an exemption for the occupied units only by obtaining or developing actual replacement units (see, Administrative Code § 27-198.2[d][4][a]), and, where an SRO building is less than 50% occupied, an owner desiring to take advantage of the replacement or buy-out options will be responsible for relocating the remaining tenants in comparable housing, at comparable rent, in the same borough of the City (see, Administrative Code § 27-198.3[a]).

Finally, the law permits an SRO owner to seek an exemption from the Commissioner of HPD, upon

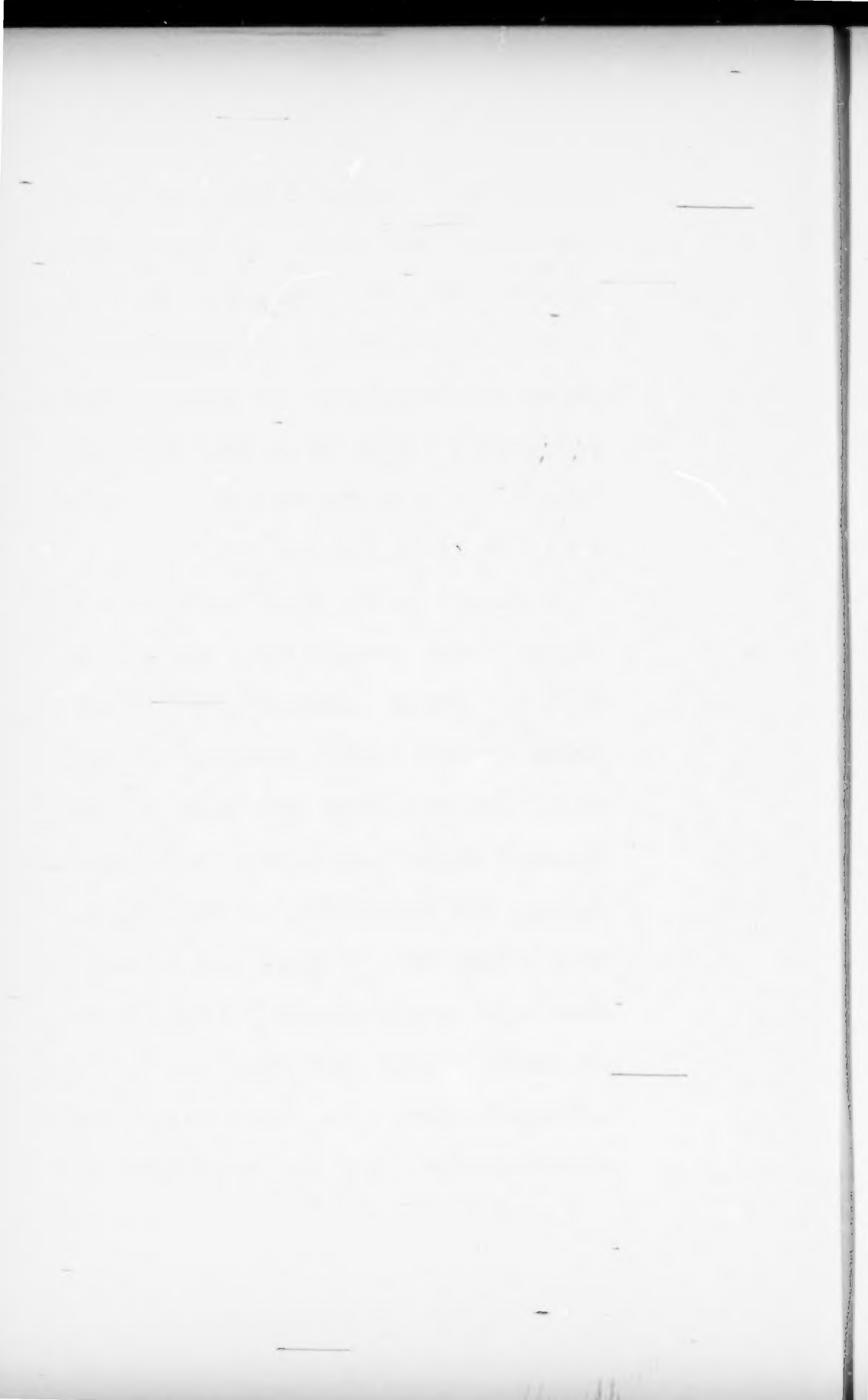


hardship grounds (see, § 27-198.2[d][4][b]), if he or she can show no possibility of earning a reasonable rate of return, which has been defined as 8 1/2% of the building's assessed value, if he or she is compelled to maintain the property as an SRO, and that utilization of the replacement exemption would substantially impair the feasibility of redeveloping the property for any other use. When such hardship is demonstrated, HPD may reduce in whole or part the amount to be contributed to the Fund or the number of replacement units to be provided by an owner, in order to withdraw SRO units from the housing market. However, the law does not allow an owner to make use of this



exemption, where his or her inability to earn a reasonable return is the consequence of intentional acts of mismanagement, which are designed to destroy the property's value as an SRO dwelling (see, Administrative Code § 27-198.2[d][4][b]).

After Local Law No. 9 took effect, the plaintiffs, in action No. 1, index number 20891/1986, Seawall, 459 West, Eastern, Sutton East, Channel Club and Anbe Realty amended their complaints, mentioned supra, and contended, in substance, Local Law No. 9 does not comply with the environmental laws, such as SEQRA, CEQR and ECL, it is an unlawful tax, is arbitrary and confiscatory, and in violation of



the Due Process and Taking Clauses of the US and NY Constitutions.

In addition to action No. 1, plaintiffs Eastern, 459 West, Durst Partners, Jambod Enterprises, Inc. (Jambod), Mygatt/Perry, Felix Ziade and Rocco Imperial commenced action No. 2, index number 04016 of 1987 against the City, and contended, in their complaint, that Local Law No. 9 is invalid, since it allegedly violates SEQRA, CEQR and ECL, which is legislation intended to protect the environment. Plaintiffs Eastern and 459 West in this action No. 2 are also plaintiffs in action No. 1. The other plaintiffs in action No. 2 are the Durst Partners, who own an SRO building, at 147-51 West 43rd Street, New York County, and that property

contains 30 SRO units, of which allegedly only one is occupied, and the remainder are vacant and uninhabitable; Jambod operates a nightclub, known as "Shout," at 124 West 43rd Street, New York County; Mygatt/Perry, an architectural firm at 102 West 43rd Street, New York County; and Messrs. Ziade and Imperial, who for more than 15 years, have resided in The Diplomat.

Testamentum commenced action No. 3, index number 7247 of 1987 against the city, on the ground Local Law No. 9 is in violation of the Due Process and Taking Clauses of the US and NY Constitutions. This plaintiff is a subsidiary of Covenant House, which is a not-for-profit corporation, with



offices located in Florida, New York, Texas, Canada and Central America. In October 1984, Testamentum, also a not-for-profit corporation, purchased the Times Square Hotel at 43rd Street and Eighth Avenue, New York County, to upgrade it, and then apparently sell the property at a profit, for the purpose of obtaining funds to support the charitable work of Covenant House. There are 735 rooms in the hotel. At the time of acquisition, Testamentum states this building was operated mainly as a hotel for transients, but it also contained some units subject to rent stabilization. Moreover, in its complaint, Testamentum contends that the income it derives "from transient guests and other



occupants is grossly insufficient to provide the hotel an adequate return for cost and upkeep."

The plaintiffs in the three actions moved for preliminary injunctive relief, upon the ground, in substance, that they would suffer irreparable harm if Local Law No. 9 was made applicable to them while the actions were pending determination. In response, the defendant City opposed the motions for a preliminary injunction, and cross-moved for summary judgment in action No. 2.

Thereafter, the IAS court consolidated the motions in the three actions, converted the plaintiffs' motions for injunctive relief to motions for summary judgment, granted the defendant



city's cross-motion for summary judgment in action No. 2, which was the action that sought invalidation of Local Law No. 9, upon the basis it violated the environmental laws, and granted the plaintiffs summary judgment in actions Nos. 1 and 3, upon the ground that the antiwarehousing, buy-out, replacement, and hardship provisions of Local Law No. 9 violated plaintiffs' due process rights, and constitute a taking of their property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments of the US Constitution. Furthermore, the IAS court held invalid those provisions of Local Law No. 9, which imposed affirmative obligations on

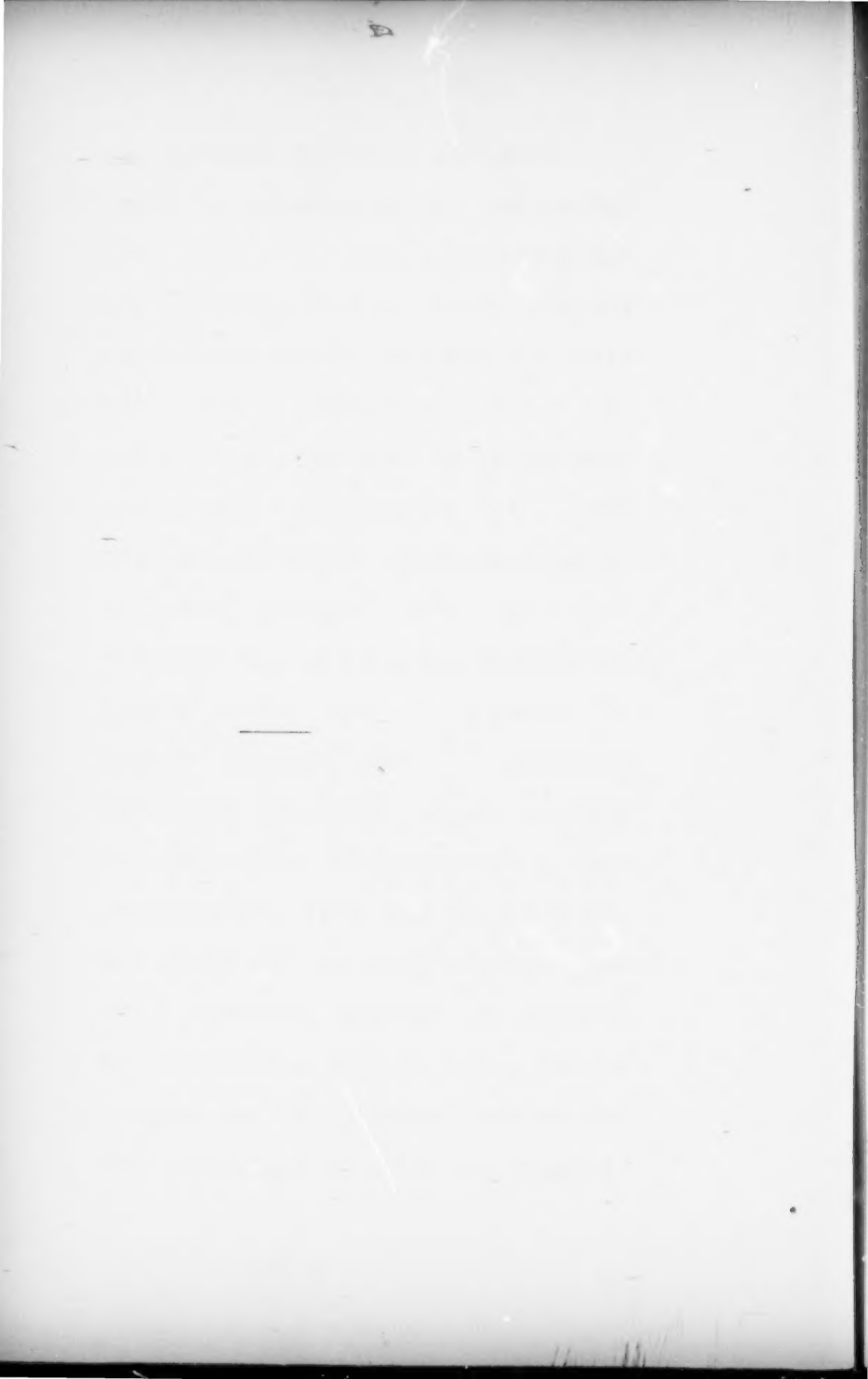


plaintiffs to rehabilitate all of their vacant SRO units, and compelled them to rent them to bona fide tenants, on the grounds that the provisions violated plaintiffs' due process rights (138 Misc 2d 96).

We recognize that every law is presumed constitutional, and only when unconstitutionality is shown to exist beyond a reasonable doubt, is the presumption overcome (Defiance Milk Prods. Co. v. Due Mond, 309 NY 537, 541 [1956]; Montgomery v. Daniels, 38 NY2d 41, 54 [1975]). This presumption of constitutionality is not limited to State statutes, since it "applies * * * to ordinances of municipalities as well" (Lighthouse Shores v. Town of Islip, 41 NY2d 7, 11 [1976]).



When the Court of Appeals, in Replan Dev. v. Department of Hous. Preservation & Dev. (70 NY2d 451, supra) found constitutional the city legislation, which eliminated J51 tax abatement for the conversion of SRO housing to other uses, it stated in that case (supra, at 457), forestalling "the loss of SRO housing and to discourage the precipitous eviction of tenants -- are valid public purposes." The United States Supreme Court recently indicated that a rent-control ordinance of the City of San Jose, California, was constitutional on its face, and "during a housing shortage, the social costs of the dislocation of low-income tenants can be severe" (Pennell v. City of San Jose, 485



US ___, ___ 108 S Ct 849, 859, n 8
[1988])).

The plaintiffs in this litigation do not contest the city's position (see, Local Laws, 1987, No. 1, § 1, which is the predecessor statute to Local Law No. 9) that, if the city had not acted to stop the extinction of SRO units, the ranks of the homeless would have increased, since the SRO owners, if left to their own devices, would have converted those units to more profitable uses. In fact, an affidavit, submitted in support of the city's position, stated that in 1987, before Local Law No. 9 became effective, there were only "approximately 52,000 SRO units * * * [left] throughout New York City".



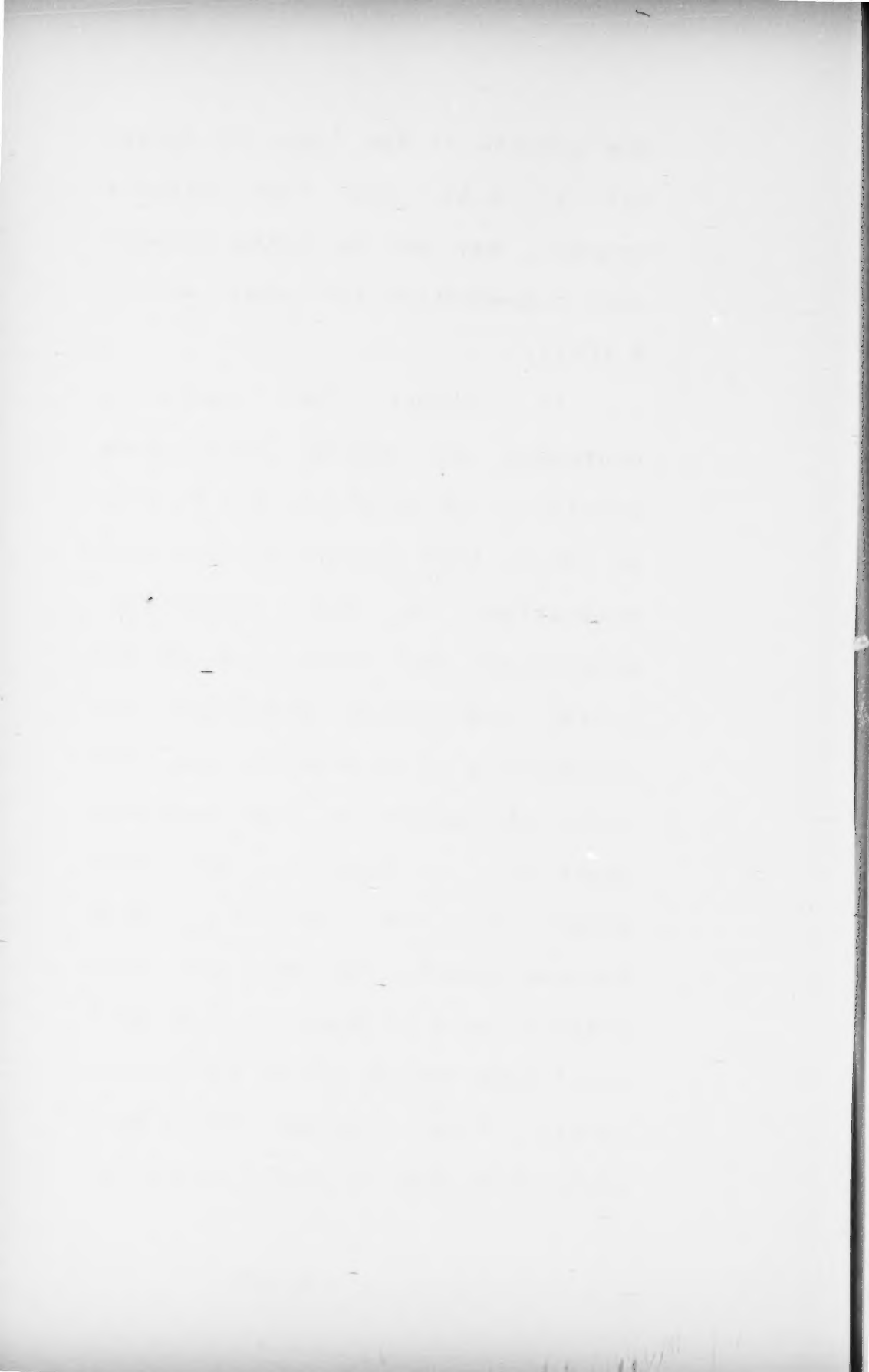
Two amendments to the United States Constitution safeguard property rights from governmental interference. Those amendments are the Due Process Clauses of the Fifth and Fourteenth, and the "Taking" or Just Compensation Clause of the Fifth. The Federal constitutional requirement of due process of law has been made applicable to the States through the Fourteenth Amendment. Further, the United States Supreme Court in Chicago, Burlington & Quincy R.R. Co. v. Chicago (166 US 226 [1897]) made the "Taking" or Just Compensation Clause of the Fifth Amendment applicable to the States.

New York's Constitution declares no person shall be deprived of his property without



due process of law (see, NY Const, Art I, § 6), and that private property may not be taken without just compensation (NY Const, Art I, § 7[a]).

It cannot be seriously contended by anyone that some provisions of Local Law No. 9, such as those that impose a five-year moratorium on the conversion, alteration, and demolition of SRO units, and which prohibits the warehousing of such units, will not cause SRO owners to lose economic benefits. However, on many occasions, the United States Supreme Court, as well as this State's Court of Appeals, have held Local Laws valid, which restricted owners from making the most profitable use of their property.



For example, the United States Supreme Court, in Penn Cent. Transp. Co. v. New York City (438 US 104 [1978]), upheld the constitutionality of New York City's Landmarks Preservation Law, which was enacted to protect historic landmarks and neighborhoods, and which requires the owners to keep them in good repair, and to seek government approval before making any exterior alteration; the Court of Appeals, in Spring Realty Co. v. New York City Loft Bd. (69 NY2d 657 [1986], appeal dismissed - US ___, 107 S. Ct 3179 [1987]), held New York City validly exercised its police power, when it enacted the Loft Law, in order to deal with a housing crisis; and, the Court of Appeals,



in Maldini v. Ambro (36 NY2d 481 [1975], appeal dismissed and cert denied 423 US 993 [1975]), upheld an amendment to a zoning ordinance of the Town of Huntington, whose purpose was to provide adequate housing for the elderly.

In Matter of Golden v. Planning Bd. (30 NY2d 359, 377-378 [1972]), the Court of Appeals significantly states: "It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth (Euclid v. Ambler Co., 272 U.S. 265 * * * National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa.



504, 532 * * *). Where those restrictions upon the beneficial use and enjoyment of land are necessary to promote the ultimate good of the community and are within the bounds of reason, they have been sustained."

The United States Supreme Court has ruled that for a statute not to constitute an unconstitutional taking, it must "substantially advance legitimate state interests," and not deny "an owner [an] economically viable use of his [or her property]" (Agin v. Tiburon, 447 US 255, 260 [1980]). In other words, there must be a relationship between the purpose of the legislation and the methods employed. Therefore, once a genuinely valid purpose is



established, a law can restrict the use of property, "unless the denial would interfere so drastically with the * * * use of * * * property as to constitute a taking" (Nollan v. California Coastal Commn., 483 US ___, ___, 107 S Ct 3141, 3147 [1987])).

Although one owner or class of owners may bear a heavier economic burden than another, that fact alone does not automatically mean that a property owner is being singled out for an unconstitutional taking (Keystone Bituminous Coal Assn. v. DeBenedictis, 480 US 470, 491-492 [1987])). The United States Supreme Court states, in pertinent part, in Keystone Bituminous Coal Assn. v. DeBenedictis (supra, at 491-492): "Under our system of



government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. * * * These restrictions are 'properly treated as part of the burden of common citizenship.'

Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' Mugler v. Kansas, 123 U.S. at 665." In Penn Cent. Transp. Co. v. New York City (supra), the United States Supreme Court ruled the city may forbid, in the public interest, the destruction or alteration of buildings.

After reviewing the record before us, we find that Local Law No. 9, following years of study and public hearings, was enacted by the Council to cope with a serious public emergency, since it is undisputed that, unless SRO owners were prohibited from converting, altering, demolishing, and warehousing their units, the City's homeless population would have risen, by the influx of former SRO tenants, who are frequently elderly and mentally or physically handicapped persons, with limited incomes.

While Local Law No. 9 may temporarily diminish the value of an SRO property for the period of the moratorium, it does not reduce the value of that property to the



level where it would be an unconstitutional taking. The Court of Appeals in de St. Aubin v. Flacke (68 NY2d 66, 77 [1986]) states that "a property owner does not prove a taking solely by evidence that the value has been reduced by the regulation, even if it has been substantially reduced.* * * To be successful [such owner] must establish that the regulation attacked so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted (Levitt v. Incorporated Vil. of Sands Point, 6 NY2d 269, 273; Arverne Bay Constr. Co. v. Thatcher, 278 NY 222, 226)." Measured by the standard of de St. Aubin v. Flacke (supra) we find that Local Law No. 9 does not



unconstitutionally deprive an SRO owner of economic benefit from his or her property, since it permits them to earn a return of 8 1/2% of the assessed value of the property, and this figure of 8 1/2% of the assessed value was derived from the hardship provisions under the rent control laws (see, Administrative Code § 26-408[b][5][a]), and rent control laws have been held constitutional in this State (Benson Realty Corp. v. Beame, 50 NY2d 994 [1980], appeal dismissed 449 US 1119 [1981]).

The city concedes, at page 32 of its main brief, that "the anti-warehousing component of the legislation is new to New York law."



Almost 40 years ago, the Court of Appeals held that a "local law cannot be held to operate as a 'taking' of * * * property without due process of law", if it is "designed to meet an immediate and pressing exigency," even if a property owner is required to remain in the housing business, when he or she would prefer to erect a commercial structure (Loab Estates v. Druhe, 300 NY 176, 180 [1949])).

Incidentally, antiwarehousing legislation has been sustained against a "taking" challenge by a Federal District Court, located in a sister State (Help Hoboken Hous. v. City of Hoboken, 650 F Supp 793, 798 [DNJ 1986])).



We disagree with the plaintiff's contention that the replacement and buy-out options of Local Law No. 9 are exorbitant, or that they are, in reality, a tax, which merely goes into the city coffers.

Our examination of the record indicates the city set the buy-out figure at \$45,000 since that was the estimated cost of the acquisition and rehabilitation of an SRO unit, and the plaintiffs offer no persuasive evidence which indicates that said sum is arbitrary or capricious.

Based upon our examination of the record, we find that these moneys, when received, rather than being used for general government purposes, will go directly into a



special fund, which is managed by the SRO Housing Development Fund Company, to pay for the acquisition, development and preservation of substitute low- and moderate-income housing. The requirement that property owners contribute to such a special fund has been held not to constitute an unconstitutional "taking." For example, the Court of Appeals in Jenad, Inc v. Village of Scarsdale, (18 NY2d 78, 84 [1966]) upheld a local law that required a cash payment from a landowner to be used for public recreation as the only way in which said owner could avoid allotting part of his or her land for such purpose, and the court, in that case, noted that the required payment was "not a tax at all but a



reasonable form of [community]
planning for the general * * *
good."

Based upon our analysis of the law and the facts supra, we find that Local Law No. 9 is constitutional in all respects, since it does not either constitute an unconstitutional taking of property or violate due process, in view of the fact that the provisions of that law are intended to accomplish the legitimate governmental goal of preventing homelessness, and do not deny the plaintiffs the opportunity to earn a reasonable rate of return on their property (see, Agains v. Tiburon, supra).

We further find that this law is constitutional, in that there



can be no unconstitutional taking of property where the law provides for, not necessarily the highest economic use, but does provides for an economically viable use. Further, as set forth supra, Local Law No. 9 contains a hardship provision (see, Administrative Code § 27-198.2[d][4]), which permits an SRO owner to seek exemption from this law, upon application to the Commissioner of HPD, who is given the power to grant such relief.

In fact, it would seem that at least some of the plaintiffs appear to have a meritorious argument for such relief and we urge they consider applying for such exemption.

Some of the plaintiffs in these consolidated actions contend



that Local Law No. 9 allegedly violates the State and city environmental laws, such as SEQRA, CEQR and ECL. This contention is meritless, since we find that Local Law No. 9 merely seeks the maintenance and/or repair of existing structures and facilities, without substantially altering them, and these plaintiffs have presented no persuasive evidence to the contrary. Therefore, since SEQRA, CEQR and ECL only require an environmental review when an action is undertaken which involves substantial changes in existing structures or facilities, we find that the action to be undertaken by the city, pursuant to Local Law No. 9, is exempt from such review (see, ECL 8-0105[5][iii]; CEQR § 4[f]).



We have reviewed the other contentions of the parties in these three consolidated actions, and find them to be without merit.

Accordingly, order and judgment (one paper), Supreme Court, New York County (David B. Saxe, J.), entered March 16, 1988, which, inter alia, declared invalid various provisions of Local Laws, 1987, No. 9 of the City of New York, and enjoined the city from implementing or enforcing them, is unanimously reversed, on the law and on the facts, the injunction is vacated, and Local Law No. 9 in its entirety is declared constitutional, without costs (action No. 1, Index No. 20891/1986).



Order and judgment (one paper) of the same court and Justice, entered March 16, 1988, which granted the cross motion of the defendants, City of New York et al., for summary judgment, to dismiss the complaint, is affirmed, without costs or disbursements (action No. 2, Index No. 04016/1987).

Order and judgment (one paper) of the same court and Justice, entered March 16, 1988, which, inter alia, declared various provisions of Local Laws, 1987, No. 9 of the City of New York invalid, and enjoined the city from implementing or enforcing them, is unanimously reversed, on the law and on the facts, the injunction is vacated, and Local Law No. 9 in its



entirety is declared constitutional, without costs (action No. 3, Index No. 7247/1987).

CARRO, ASCH and ELLERIN, JJ., concur.

Orders and judgments (two papers), Supreme Court, New York County, both entered on March 16, 1988 (actions Nos. 1 and 3), unanimously reversed, on the law and on the facts, the injunction is vacated, and Local Law No. 9 in its entirety is declared constitutional, without costs and without disbursements.

Order and judgment (one paper), Supreme Court, New York County, entered on March 16, 1988 (action No. 2), unanimously



affirmed, without costs and without
disbursements.



DECISION OF THE NEW YORK STATE
SUPREME COURT, DATED NOVEMBER 23,
1987

SEAWALL ASSOCIATES et al.,
Plaintiffs v. CITY OF NEW YORK et
al., Defendants. RICHARD WILKERSON
et al., Intervenors. (Action No.
1).

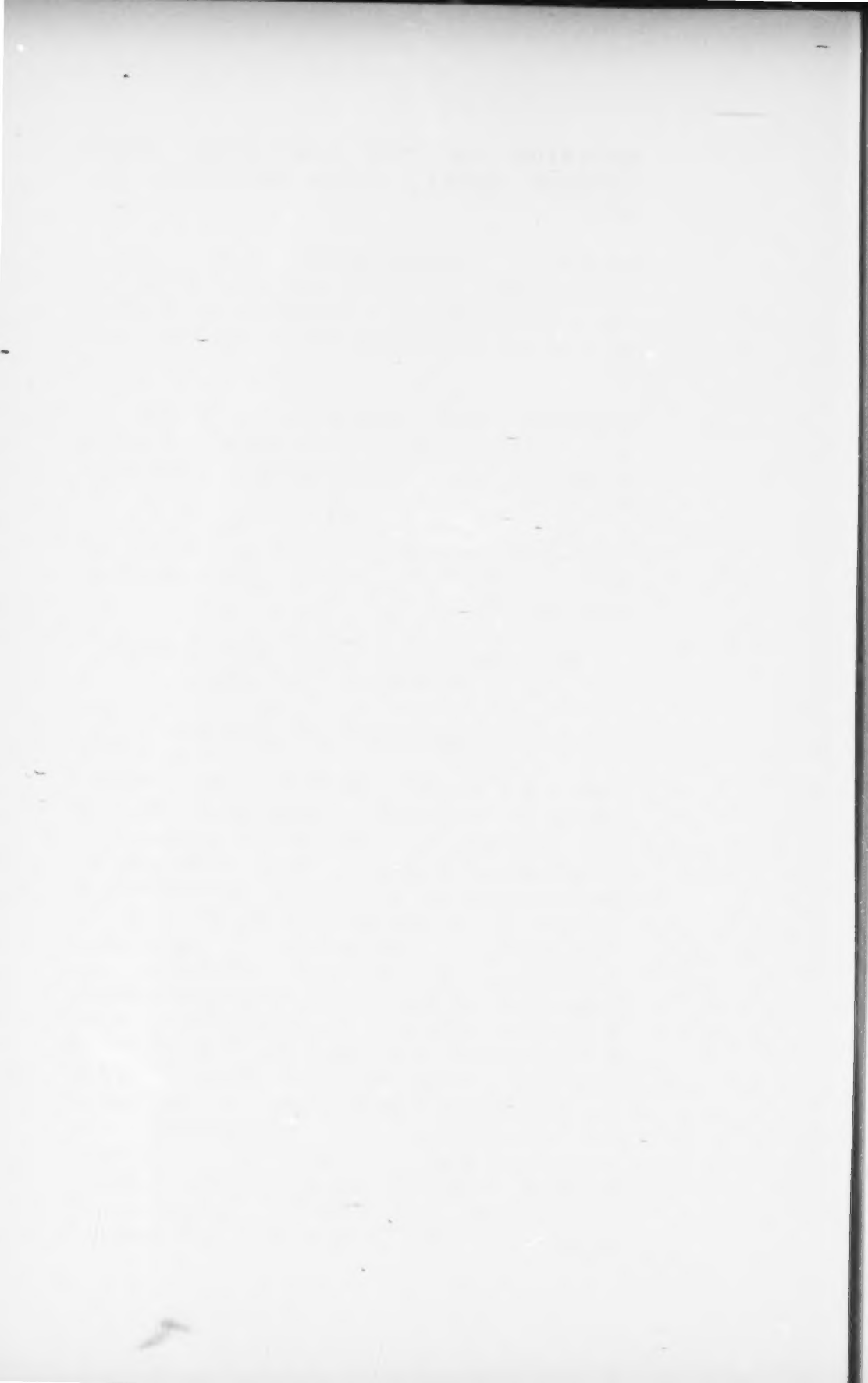
EASTERN PORK PRODUCTS COMPANY et
al., Plaintiffs, v. CITY OF NEW
YORK et al., Defendants. (Action
No. 2).

TESTAMENTUM, Plaintiff v. CITY OF
NEW YORK et al., Defendants.
(Action No. 3.)

- Supreme Court, New York County,
November 23, 1987

APPEARANCES OF COUNSEL

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Kennedy, Schilling & O'Shea (Edmund
J. Burns and Maria Scorcio of
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No. 3. Peter L. Zimroth, Corporation Counsel (Gabriel Taussig and Albert Frederick of counsel), for defendants. Mitchell S. Bernard, Norman Siegel, Robert M. Hayes, Saralee Evans and Wayne Hawley for intervenors and amicus curiae.

OPINION OF THE COURT

DAVID B. SAXE, J.

Once again, owners of buildings containing single-room occupancy (SRO) units,¹ challenge legislation which attempts to lessen the growth of the homeless population in the City of New York by prohibiting the conversion,

¹ An SRO is defined as a living unit which shares a kitchen and/or bathroom with one or more other units. (Blackburn, Single Room Occupancy in New York City, 1986 Report - prepared for the City of New York Department of Housing, Preservation and Development.)



alteration or demolition of privately owned SRO buildings.²

The issue that I must decide is whether the buy-out, replacement and hardship exemptions contained in this new legislation (Local Laws, 1987, No. 9 of City of New

²Challenges of this sort have occurred before (see, for example, Local Laws, 1985, No. 59 of City of New York, Declaration of legislative findings and intent ["The council hereby finds and declares that a serious public emergency exists in the housing of a considerable number of persons which emergency has been created by the loss of single room occupancy units housing lower income persons: that the loss of such housing units has caused serious hardship for occupants who have been forced to relocate * * * that a considerable number of such persons have become part of a growing homeless population; that the intervention of the city government is necessary to protect such housing stock by imposing a moratorium on conversions, alterations and demolitions of single room occupancy multiple dwellings"])).



York)³ cure the constitutional infirmities of its predecessor (Local Laws, 1986, No. 22) which I invalidated in Seawall Assocs. v. City of New York (134 Misc2d 187) (Seawall I).

A brief recounting of the legislative history is necessary. Since 1985 the New York City Council has enacted several local laws designed to halt the decline of SRO housing. In July 1986, the City Council by enacting Local Laws, 1986, No. 22 of the City of New York⁴ extended the moratorium initiated by Local Laws, 1985, No.

³Administrative Code of City of New York § 27-198.2.

⁴Administrative Code of City of New York §C26-118.10.



59 of the City of New York which prevented the demolition or alteration of most SRO buildings.⁵ However, Local Law No. 22 in addition to providing for a moratorium on the alteration, conversion or demolition of SRO buildings also imposed an affirmative obligation upon SRO owners to rent these units⁶ and to maintain them in habitable condition. In addition, if the units were in disrepair, owners would be required to renovate

⁵Administrative Code of City of New York § C26-118.10, as added by Local Law No. 59 of 1985.

⁶This obligation is commonly referred to as the "antiwarehousing" provision. (See, Administrative Code of City of New York §D26-58.02.)



them.⁷ Local Law No. 22 applied only to privately owned buildings. Those buildings owned in rem by the City of New York were exempt from the requirements of this law.⁸

When Local Law No. 22 was enacted, certain SRO building owners sought a preliminary injunction staying the enforcement of the law. The plaintiffs argued that Local Law No. 22 violated their constitutional right to due process of law and sought to enjoin its enforcement. In Seawall I (supra) I held that the antiwarehousing regulations contained in Local Law No. 22 were

⁷ See, n. 6.

⁸ Administrative Code of City of New York §C26-118.10(b)(1)(4).



"unreasonable and arbitrary" frustrating "plaintiffs' property rights without due process of law." - (Supra, at 197.) I also found that Local Law No. 22 took away all development rights of property owners by requiring that they invest thousands of dollars to rehabilitate the SRO units. Moreover, I noted that it was constitutionally suspect to require "owners to be in a business in which they had no intention, expertise or expectation of being involved in." (Supra, at 195). Therefore, I granted a preliminary injunction preventing enforcement or implementation of those aspects of the law which required SRO owners to invest substantial amounts of money to rehabilitate



their units and to rent them to tenants. The granting of this relief was premised upon a violation of due process rights of SRO owners amounting to irreparable injury.

On February 2, 1987 the City Council enacted a new Local Laws, 1987, No. 1 of the City of New York.⁹ Thereafter, several amendments to that law were approved and on March 5, 1987 the provisions of Local Law No. 1, as amended, were enacted as Local Laws, 1987, No. 9 of the City of New York.¹⁰ Local Law No. 1 continued the moratorium

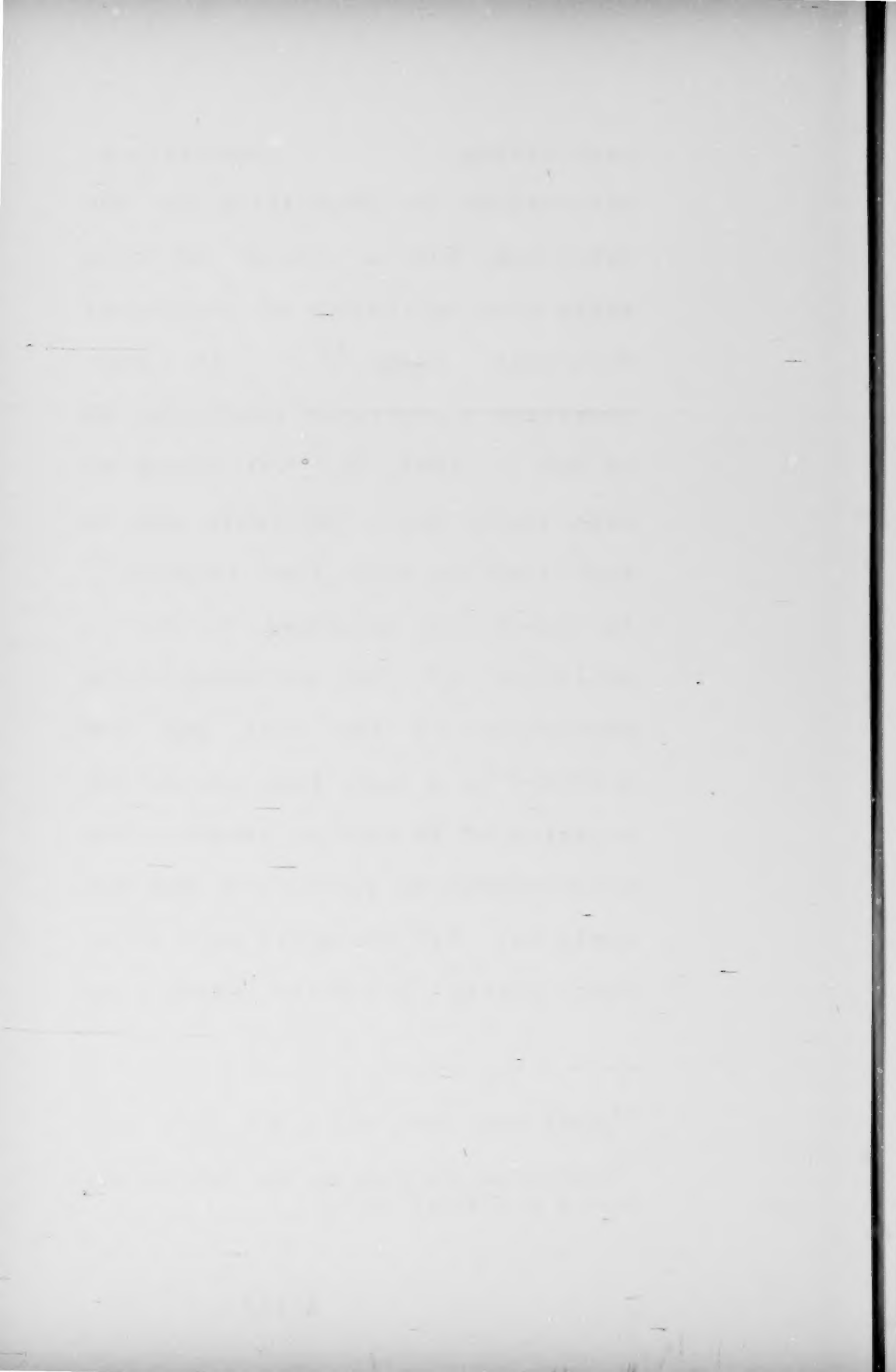
⁹ Administrative Code of City of New York § 27-198.2.

¹⁰ See n. 3.

prohibiting conversions, alterations or demolition of SRO dwellings for a period of five years with extensions of additional five-year terms.¹¹ It also contained a provision requiring, as of May 1, 1987, all SRO owners to make these units habitable and to rent them to bona fide tenants.¹² An owner was presumed to be in violation of the antiwarehousing provisions if the unit was not occupied by a bona fide tenant for a period of 30 days or longer. The antiwarehousing provisions did not apply to: (1) SRO units with 24 or less units; (2) units which had

¹¹Local Laws, 1987, No. 1, § 5.

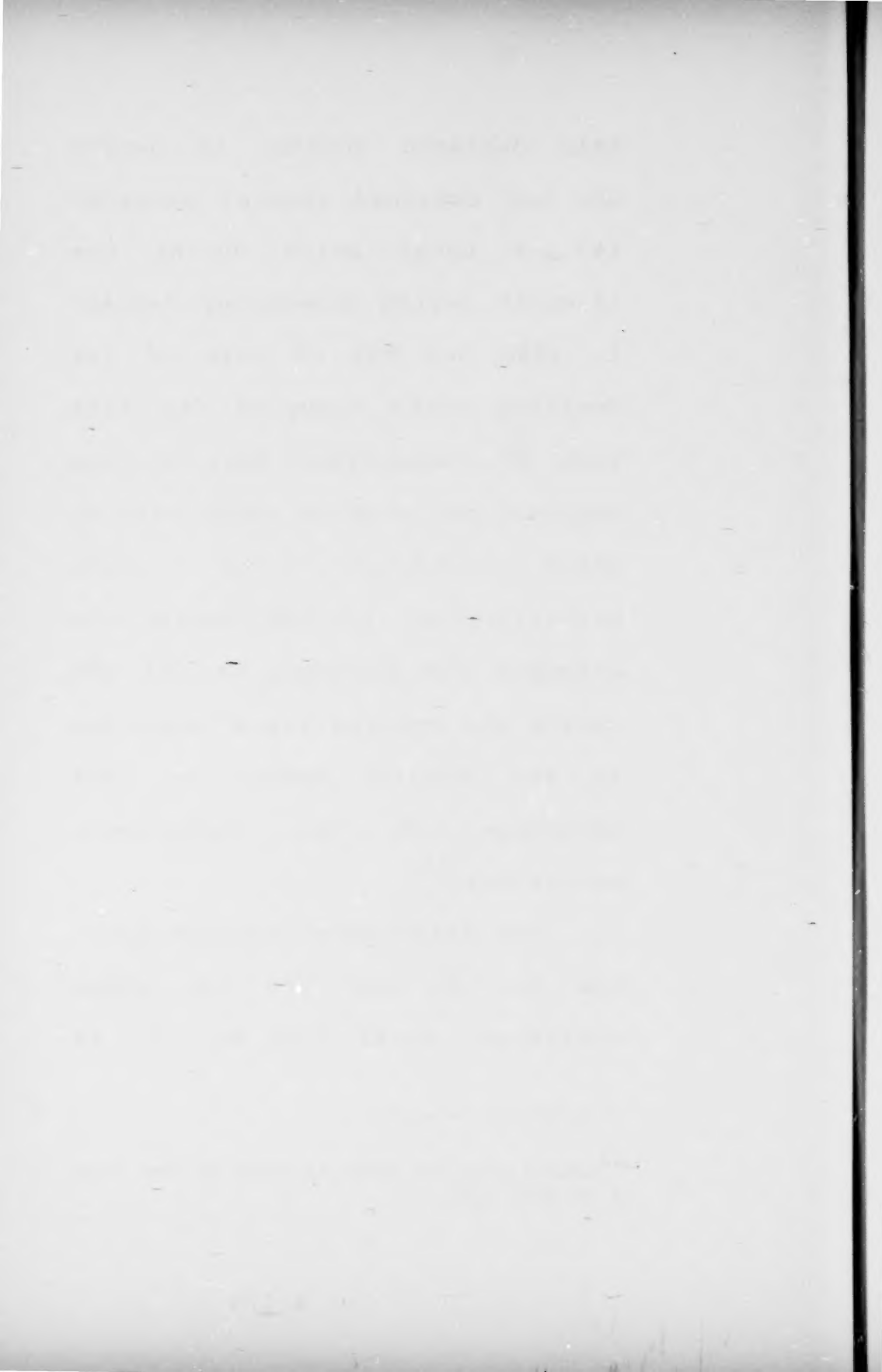
¹²Administrative Code of the City of New York § 27-2151(a)(1), (2).



been declared unsafe; (3) owners who had obtained special permits; (4) any hotel which during the 12-month period commencing January 1, 1984 had 90% or more of its dwelling units occupied for less than 30 consecutive days by one occupant and in which there were no units subject to rent stabilization; (5) SRO owners who arranged for buyouts; or (6) SRO owners who applied for a reduction in the buy-out amount or took advantage of the replacement provisions.¹³

The differences between Local Law No. 22 and the law under challenge, Local Law No. 9, is

¹³Administrative Code of City of New York § 27-198.2(d).



primarily in three areas: (1) the addition of a cash buy-out provision; (2) the obligation of SRO owners to create replacement housing; and (3) a hardship "escape" provision. The law still contains the anti-warehousing provisions which I previously held to be unconstitutional.

THE BUY-OUT EXEMPTION

Local Law No. 9 currently provides that an SRO owner has the option of either paying \$45,000 per SRO unit or "such other amount which the commissioner of housing preservation and development determines by regulation would equal the cost of creating a dwelling unit * * * to replace such single room occupancy dwelling unit," in order to be exempt from

the moratorium. The funds are to be collected and administered by a newly created SRO Development Fund. These moneys are to be used to preserve, acquire and develop low and moderate income housing throughout New York City. Local Law No. 9 changes the buy-out exemption contained in Local Law No. 1 by providing that where 50% or more of SRO units are occupied as of January 20, 1987 the owner "shall be required to provide for replacement units" approved by the Commissioner.¹⁴ (Emphasis added.) This mandatory replacement plan also requires "either for the sale or net lease of the multiple

¹⁴Administrative Code of the City of New York § 27-198.2(d)(4)(a)(i).

dwelling containing such dwelling units to a not-for-profit organization or for such other form of transfer of ownership, management or possession of such multiple dwelling approved by [the] commissioner."¹⁵

THE REPLACEMENT EXEMPTION

The replacement multiple dwelling "shall include but not be limited to a 'single room occupancy multiple dwelling.' In the event that an existing multiple dwelling is acquired for the purpose of providing replacement units, such multiple dwelling shall be located in the same or adjacent community board in which the single room

¹⁵ Administrative Code of the City of New York § 27-198.2(d)(4)(a)(ii).

occupancy multiple dwelling which is to be altered, converted or demolished is located."¹⁶ Replacement may be achieved by the acquisition of a multiple dwelling, the substantial rehabilitation of existing dwelling units or by the creation of dwelling units by construction of new multiple dwellings.

THE HARDSHIP EXEMPTION

The amount of the payment required (\$45,000 per unit) or the number of dwelling units provided may be reduced in whole or in part by the Commissioner of Housing Preservation and Development if the owner shows that the property

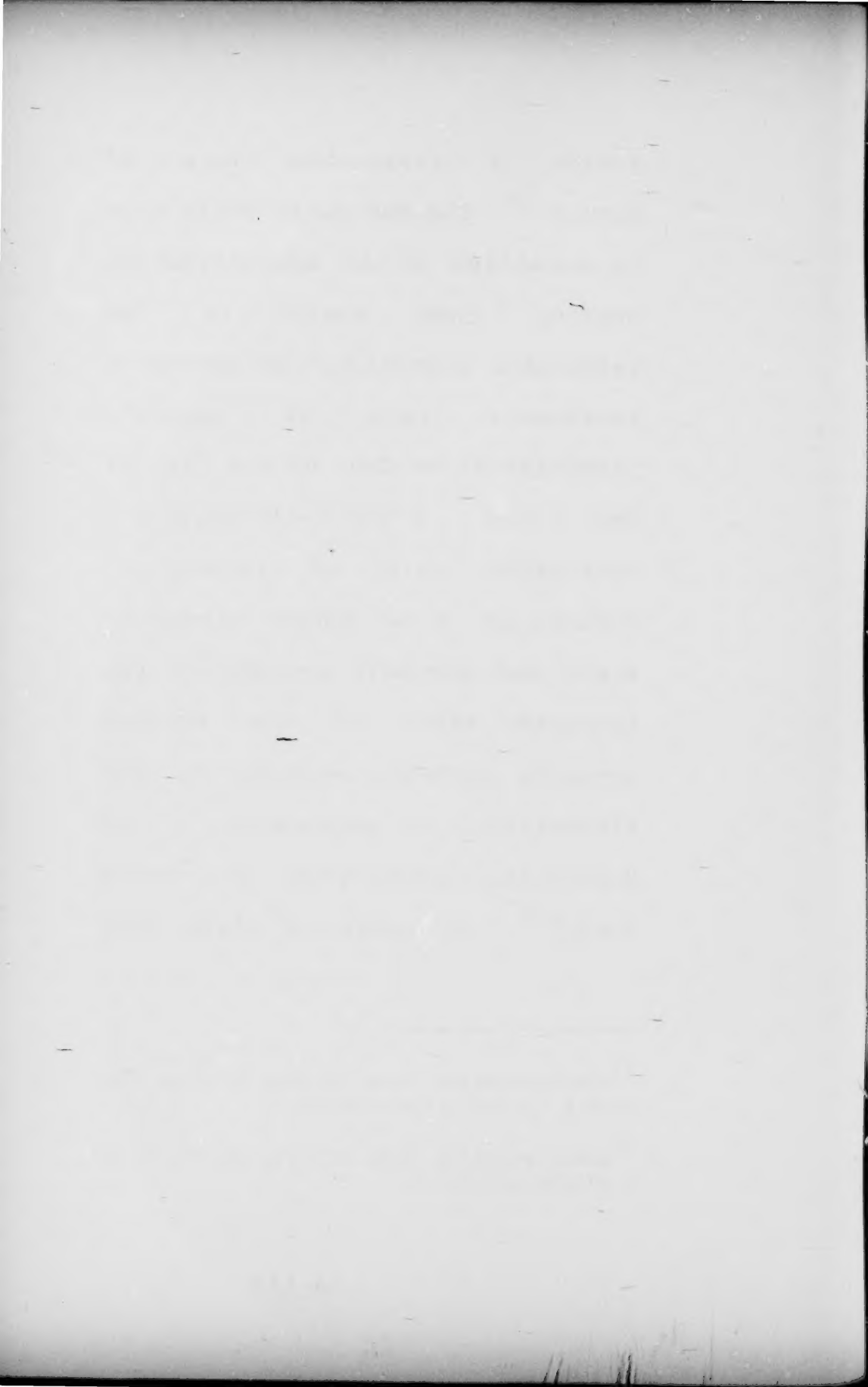
¹⁶Administrative Code of the City of New York § 27-198.2(d)(4)(a)(ii).



yields a reasonable rate of return.¹⁷ The SRO owner would have to establish at an administrative hearing that there is "no reasonable possibility" of making "a reasonable rate of return". (Administrative Code of the City of New York § 198.2[d][4][b][i].) Reasonable rate of return is defined as "a net annual return of eight and one-half percent of the assessed value of the subject property without recourse to the alteration, conversion or demolition prohibited by [this law]."¹⁸ In order to claim this

¹⁷ Administrative Code of the City of New York § 27-198.2(d)(4)(b)(i).

¹⁸ Administrative Code of City of New York § 27-198.2(d)(4)(b).

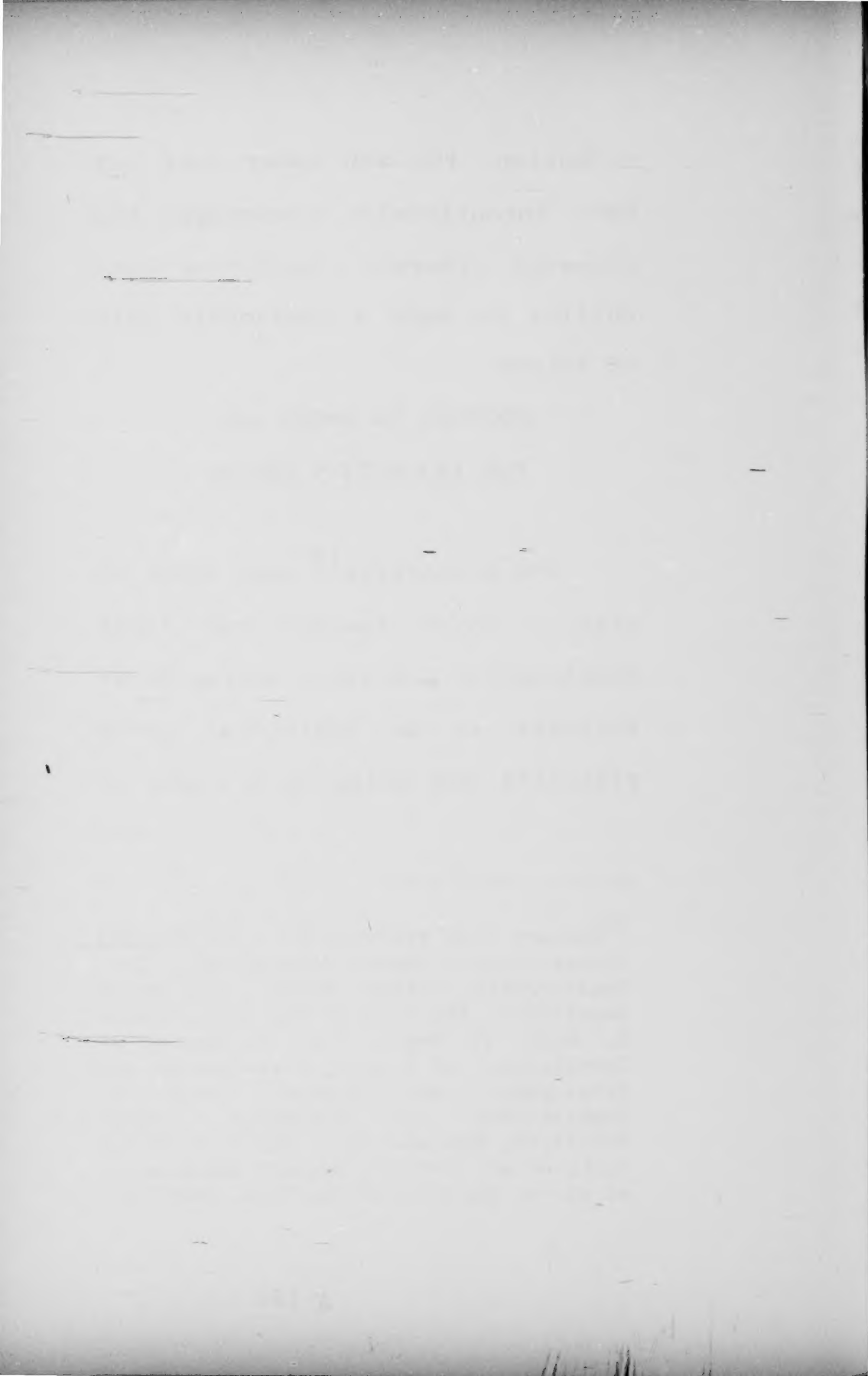


exemption, the SRO owner must not have intentionally mismanaged the property thereby impairing its ability to earn a reasonable rate of return.

MOTIONS TO AMEND AND
FOR INJUNCTIVE RELIEF

The plaintiffs¹⁹ seek leave to file a Third Amended and First Supplemental Complaint adding Durst Partners as an additional party plaintiff and alleging a cause of

¹⁹Eastern Pork Products Co., 459 W. 43rd Street Corp., Jambod Enterprises, Inc. Myqatt/Perry, Felix Ziode, and Rocco Imperial v. The City of New York, Edward I. Koch, as Mayor, Paul C. Crotty as Commissioner of Housing Preservation and Development and Charles Smith as Commissioner of Buildings, Index #04016/87; Testamentum v. The City of New York, et al. 7247/87; Seawall Associates, et al. v. The City of New York, 20891/86.



action challenging the validity of Local Law 1 as amended by and reenacted as Local Law 9. Leave to amend pleadings shall be freely given in the absence of prejudice (CPLR 3025[b]; Rife v. Union College, 30 AD2d 504). The defendants have not demonstrated any prejudice since the amendment merely updates the facts which have been known to them. Accordingly, the complaints are deemed amended and the arguments raised shall be considered in evaluating Local Law 9. Preliminarily, since the three related actions all present common questions of law and fact, the motions for injunctive relief and the cross motion by the City of New York for summary judgment on the

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SEQRA claims are consolidated for disposition.

In fact, since all the parties seek dispositive legal relief, I will treat the plaintiffs' motions as seeking an order of summary judgment.

The underlying complaints which form the basis for declaratory and injunctive relief all assert the same arguments regarding the alleged invalidity of Local Law No. 9. Plaintiffs contend that (1) the city failed to consider the environmental impact of Local Law No. 9 on existing population concentrations and its noncompliance with the State Environmental Quality Review Act (SEQRA), the City Environmental Quality Review Act (CEQR) and the

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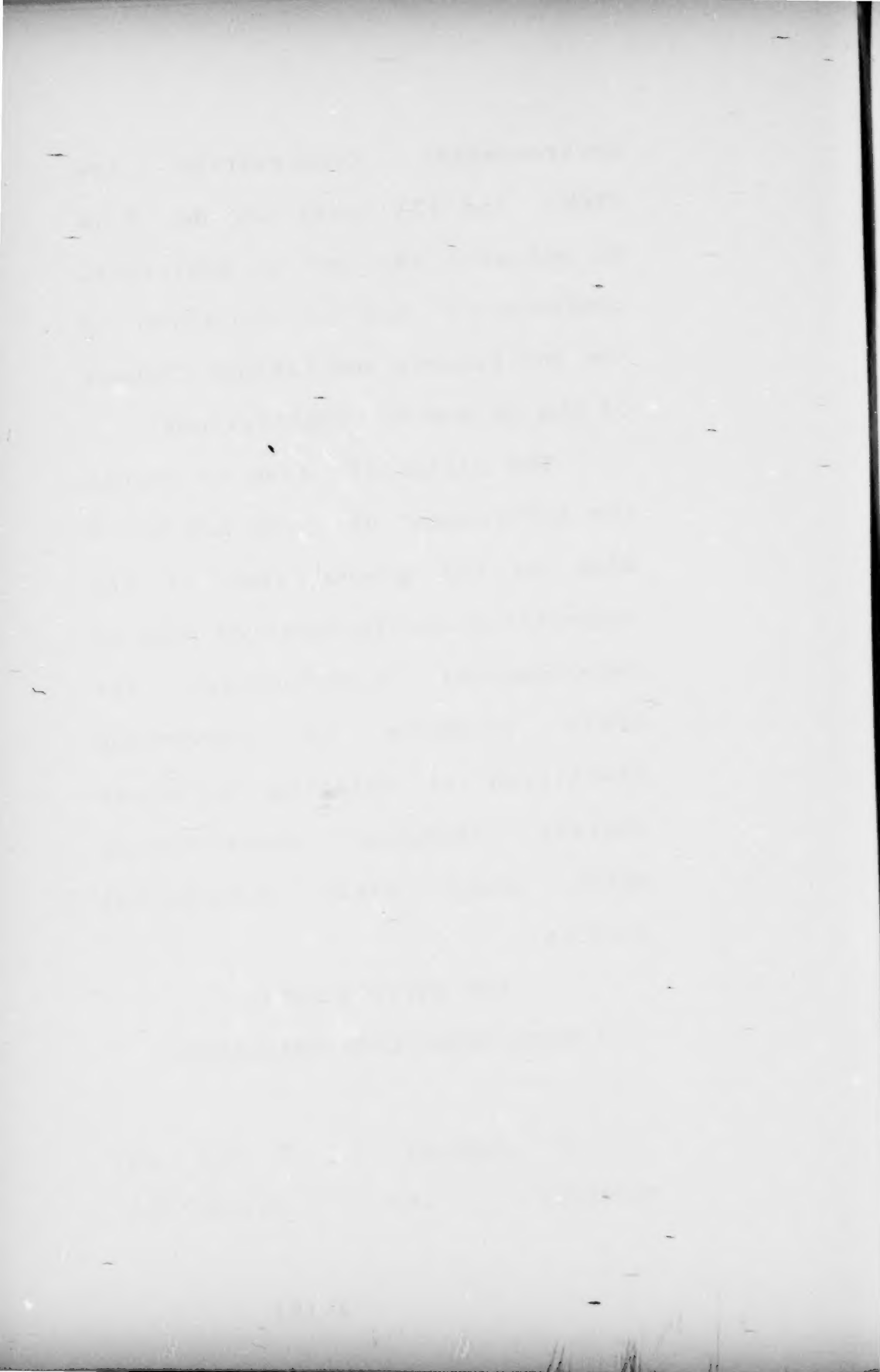
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Environmental Conservation Law (ECL); and (2) Local Law No. 9 is an unlawful tax and is arbitrary, confiscatory and in violation of the Due Process and Takings Clauses of the US and NY Constitutions.

The plaintiffs seek to enjoin the enforcement of Local Law No. 9 also on the ground that it has unconstitutionally deprived them of developmental opportunities for their property by preventing demolition of existing buildings thereby impeding opportunities which would yield substantial profits.

THE ENVIRONMENTAL
(SEQRA/SEQRA/CEQR CHALLENGES)

In Seawall I, I did not consider the plaintiffs'



environmental challenge on the merits because I held that they lacked standing to assert those claims. The plaintiffs, 459 W. 43rd Street Corp. and Eastern Pork Products Co., have now joined additional plaintiffs, Jambod and Perry, operators of businesses in a neighborhood containing SRO dwellings who would therefore be directly affected by population movement and pedestrian traffic so as to establish standing.

Under the liberal definition of standing in Glen Head v. Oyster Bay, 88 AD2d 484, (2nd Dept. 1982), the plaintiffs must show that the environmental consequences of the proposed project fall within the zone of interest protected by SEQRA. In Chinese Staff and

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Workers Assn. v. The City of New York, 68 NY2d 359 (1986) the plaintiffs were members of the Chinatown community who challenged the issuance of a special zoning permit authorizing construction of a high-rise luxury tower in Chinatown. The plaintiffs, businessmen and workers who lived and worked in Chinatown argued that the proposed project could ultimately displace them and have an environmental impact on their lives. The Court of Appeals, in finding these concerns legitimate, implicitly found that the plaintiffs had standing to sue. Here, the plaintiffs, who are business owners in the affected area have demonstrated that they fall within the zone of interest

protected by SEQRA and CEQR. As such, they are entitled to have their contentions regarding the City's failure to conduct an environmental review prior to passage of the SRO legislation considered on the merits.

In Eastern Pork Products Co., 459 W. 43rd Street Corp., Jambod Enterprise, Inc., Mygatt/Perry Ziade and Imperial v. The City of New York, et al. Index No. 04016/86 the City cross-moved for summary judgment dismissing the entire complaint based solely on non-compliance with ("SEQRA"). In the other two related actions, the plaintiffs assert causes of action seeking to invalidate Local Law 9 on the basis that the City failed to conduct a proper environmental



review prior to enactment of the SRO legislation as prescribed by State and City environmental laws (E.C.L. §8-0101 et seq; 6 NYCRR §617; Mayor's Executive Order No. 91 of 1977 [CEQR]).

Pursuant to these laws, any proposed "action" on the part of New York City officials and agencies having a "significant effect on the environment" is required to undergo an environmental impact review. (6 NYCRR §617.2[b][1]). SEQRA defines "action" to include projects, policies and regulations (ECL §8-0105[4]). The state regulations construe the term "action," inter alia, as "projects or physical activities, such as construction or other activities which change the

use or appearance of any natural resource or structures . . ." (6 NYCRR 617.2[b]). SEQRA also authorizes agencies to promulgate regulations specifying certain types of actions having an impact not reaching the level of environmental significance thereby warranting the preparation of an environmental impact statement ("EIS"; ECL §8-0113[2][c][ii]). These type II actions, like exempt actions, require no review pursuant to SEQRA, its regulations, or CEQR. Type II actions include proposals which contemplate "replacement of a facility, in kind, on the same site unless such facility meets any of the thresholds for Type I actions." (6 NYCRR §617.13[d][1]).

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Here, Local Law 9 is under challenge precisely because it prohibits the SRO owners from making any change or alteration to existing structures. Since the law requires SRO owners to maintain units in habitable condition it falls within the exemption concerning maintenance and repair of existing structures or facilities. So, an "EIS" is not required. (ECL 8-0105-[5][iii]; 6 NYCRR §§617.2[b][3] and 617.13[d][i]; CEQR §4[f]).

The major cases cited by the plaintiffs in support of their argument that an environmental impact statement ("EIS") was required to be prepared prior to the enactment of Local Law 9, are distinguishable from the facts of

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this case. In Chinese Staff, supra, the City evaluated the environmental effects of the proposed construction in accordance with SEQRA. The co-lead agencies issued a "conditional negative" declaration asserting that the project would not have a significant effect on the environment if certain modifications were adopted by the developer. Thus, a full-scale "EIS" was not required. The Court of Appeals disagreed and declared that the proposed erection of luxury tower in Chinatown required a full scale "EIS" and that the special permit was invalid. The issue there, was not whether the proposed project constituted a government action requiring an

environmental review but, whether the environmental review undertaken by the City was adequate. The Court held that SEQRA required that an agency consider the potential long-term secondary displacement of residents and businesses and its effect on population patterns, community goals and neighborhood character even where there was no impact on the physical environment. Here, the question is whether an environmental review was required in connection with the enactment of Local Law 9 and whether the law falls within certain exemptions to the environmental review process.

In the other major case cited by the plaintiffs Midtown South Preservation and Development Committee v. The City of New York,

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AD2d, 515 NYS2d 248 (First Dept. 1987) the Appellate Division modified the New York County Supreme Court's order which granted a preliminary injunction and mandated a review of the potential environmental consequences of a policy of "housing homeless families in an area which cannot provide adequate facilities for social and recreational activities." The Court held that a preliminary injunction should not have been granted because the plaintiffs failed to demonstrate that they were likely to prevail on the ultimate merits. Moreover, the Court stated, "Nor is it evident that finding shelter for homeless families is the sort of action

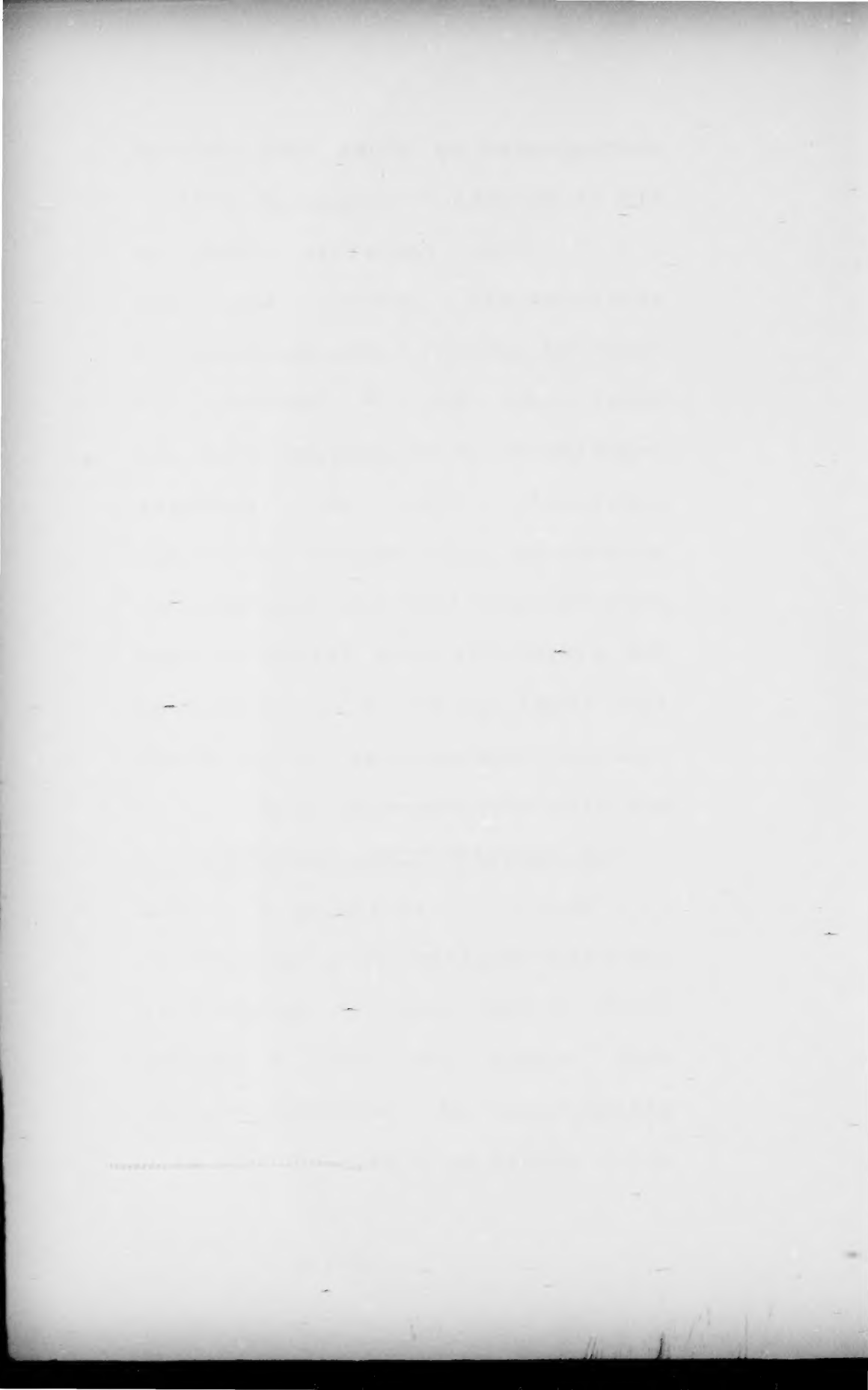


contemplated by SEQRA such that an EIS is mandate." (supra at 250).

I find, therefore, that an environmental review was not required prior to the enactment of Local Law No. 9 because the legislation only contemplated the continued use of existing structures in a manner consistent with current land use regulations. The plaintiffs have failed to show that Local Law No. 9 is the sort of "action" contemplated by the State and City environmental laws.

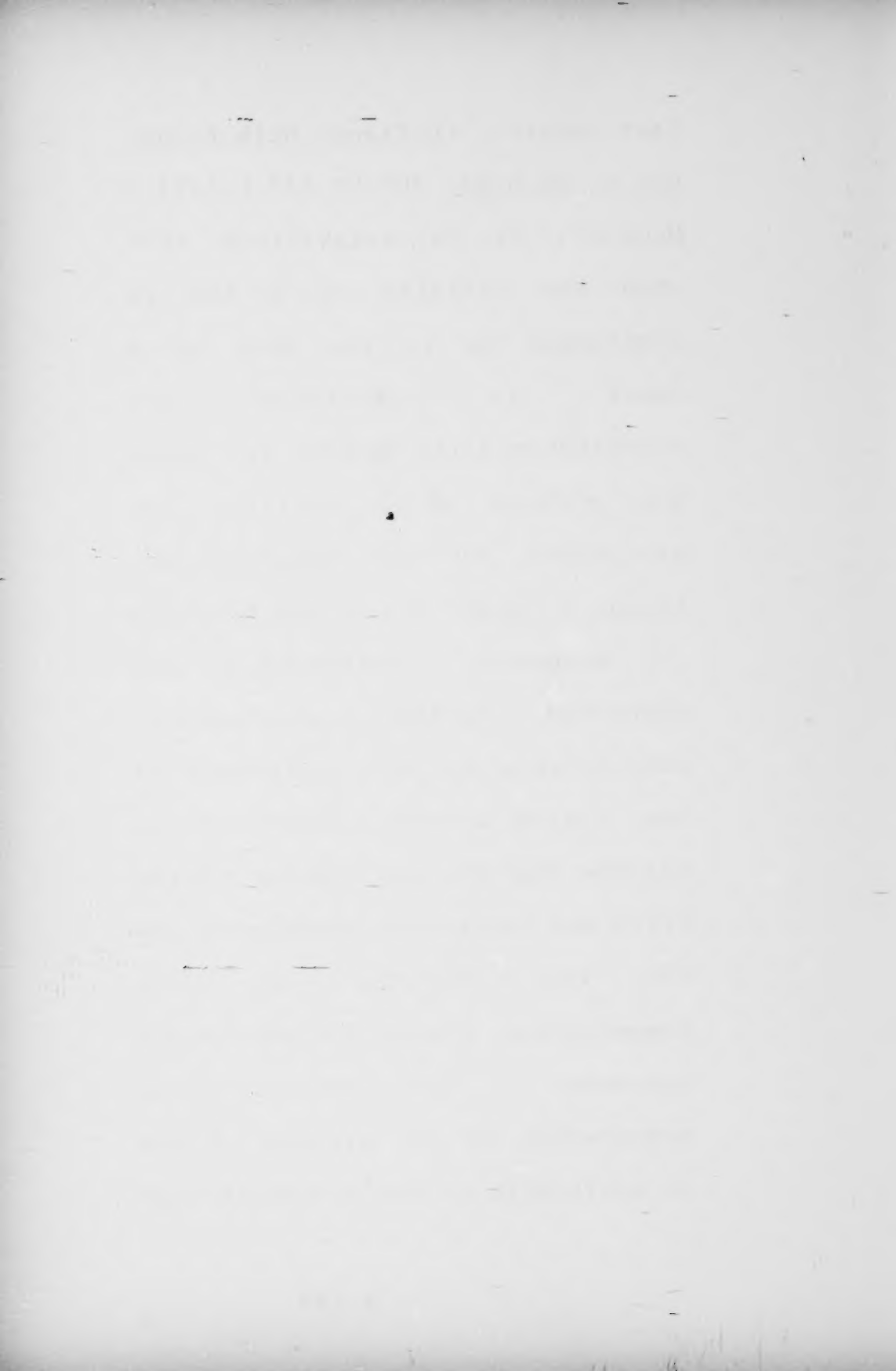
THE CONSTITUTIONAL CHALLENGE

When reviewing the constitutionality of a statute, a court starts with the proposition that every law has a strong presumption of constitutionality which should be discarded only as a



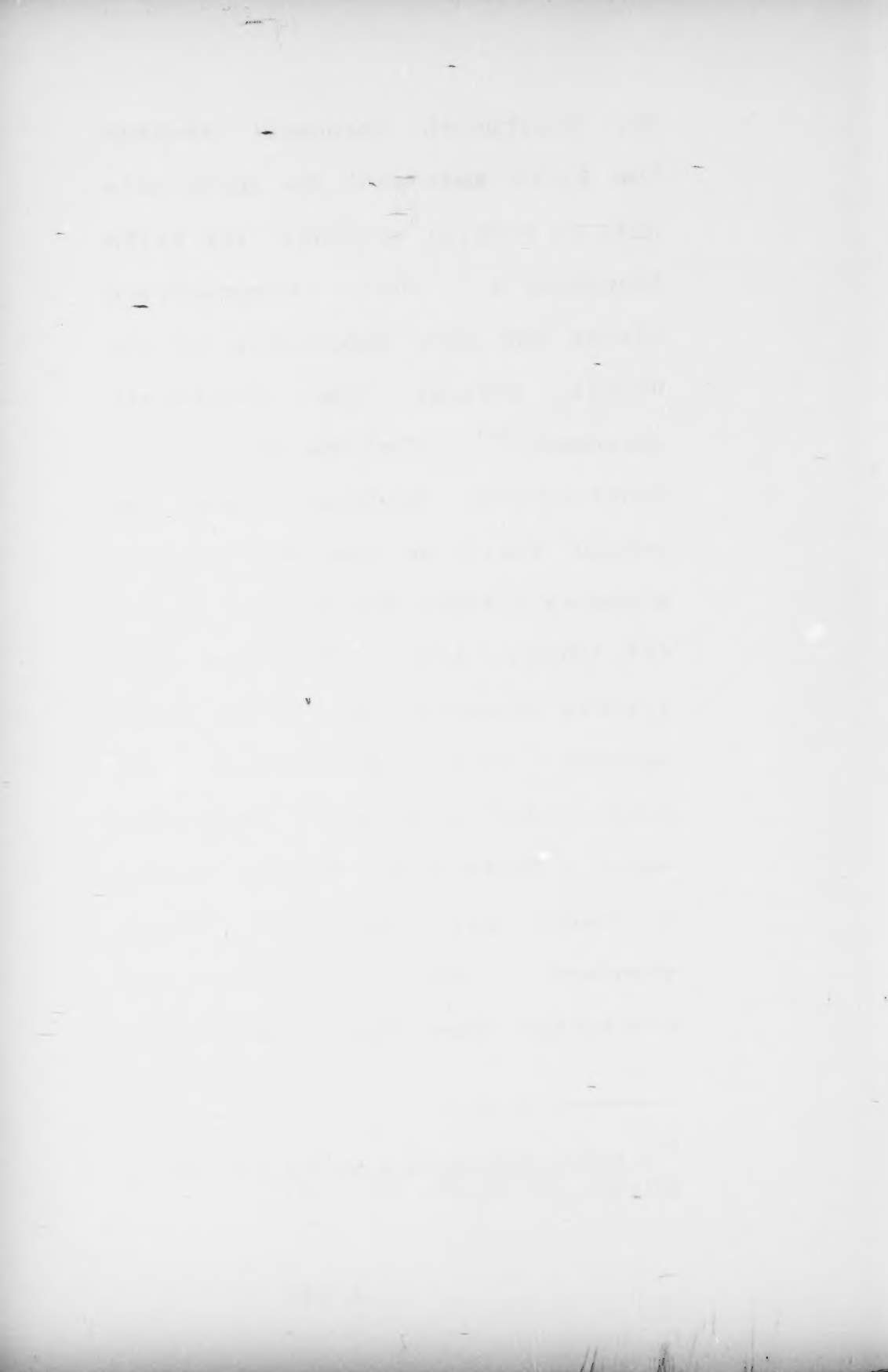
last resort. (Defiance Milk Prods. Co. v. Du Mond, 309 NY 537 [1956].) However, it is established that when the validity of a law is challenged it is the duty of a court to determine its constitutionality and to set aside any statute which violates the provisions of the Constitution. (Colon v. Lisk, 153 NY 188 [1897].)

Property interests are protected against governmental interference by two provisions of the United States Constitution: (1) the Due Process Clause of the Fifth and Fourteenth Amendments and (2) the "Takings" or Just Compensation Clause of the Fifth Amendment. The constitutional requirement of due process of law is applicable to the States through



the Fourteenth Amendment whereas the Fifth Amendment is applicable only to Federal actions. The Fifth Amendment's Just Compensation Clause was made applicable to the States through the Fourteenth Amendment.²⁰ The New York State Constitution declares that no person shall be deprived of his property without due process of law (NY Const., Art I, § 6) and that private property may not be taken without just compensation (NY Const., Art I, §7[a]). Moreover, under a State's Due Process Clause a court may impose a higher standard of constitutional protection than that required of

²⁰Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 US 226, 236 (1897).



the Federal Government. (People v. Isaacson, 44 NY2d 511 [978].)

A State normally cannot require an owner to use his property for the benefit of others or for the public in general or to restrain an owner from devoting it to any legal purpose so long as such use does not conflict with the rights of others. (People v. New York Carbonic Acid Gas Co., 196 NY 421.) However, under appropriate circumstances a State may regulate the use to which private property is put for the health, safety and welfare of the public. Nevertheless, a regulation ostensibly enacted under this aspect of State authority, known as the police power, may so severely restrict the enjoyment of an

individual's property rights as to amount to a taking for which compensation must be paid.

The point at which the police power interferes with property rights and becomes a taking cannot be precisely defined. That examination necessarily requires a weighing of private and public interests. (Webb's Fabulous Pharmacies v. Beckwith, 449 US 155 [1980].) While property may be regulated to a certain extent, if regulation goes too far it will be considered a taking. (Lutheran Church v. City of New York, 35 NY2d 121 [1974].) In Lutheran Church, a religious corporation owned and used a former mansion for its own offices. The building was no longer adequate for its needs so it

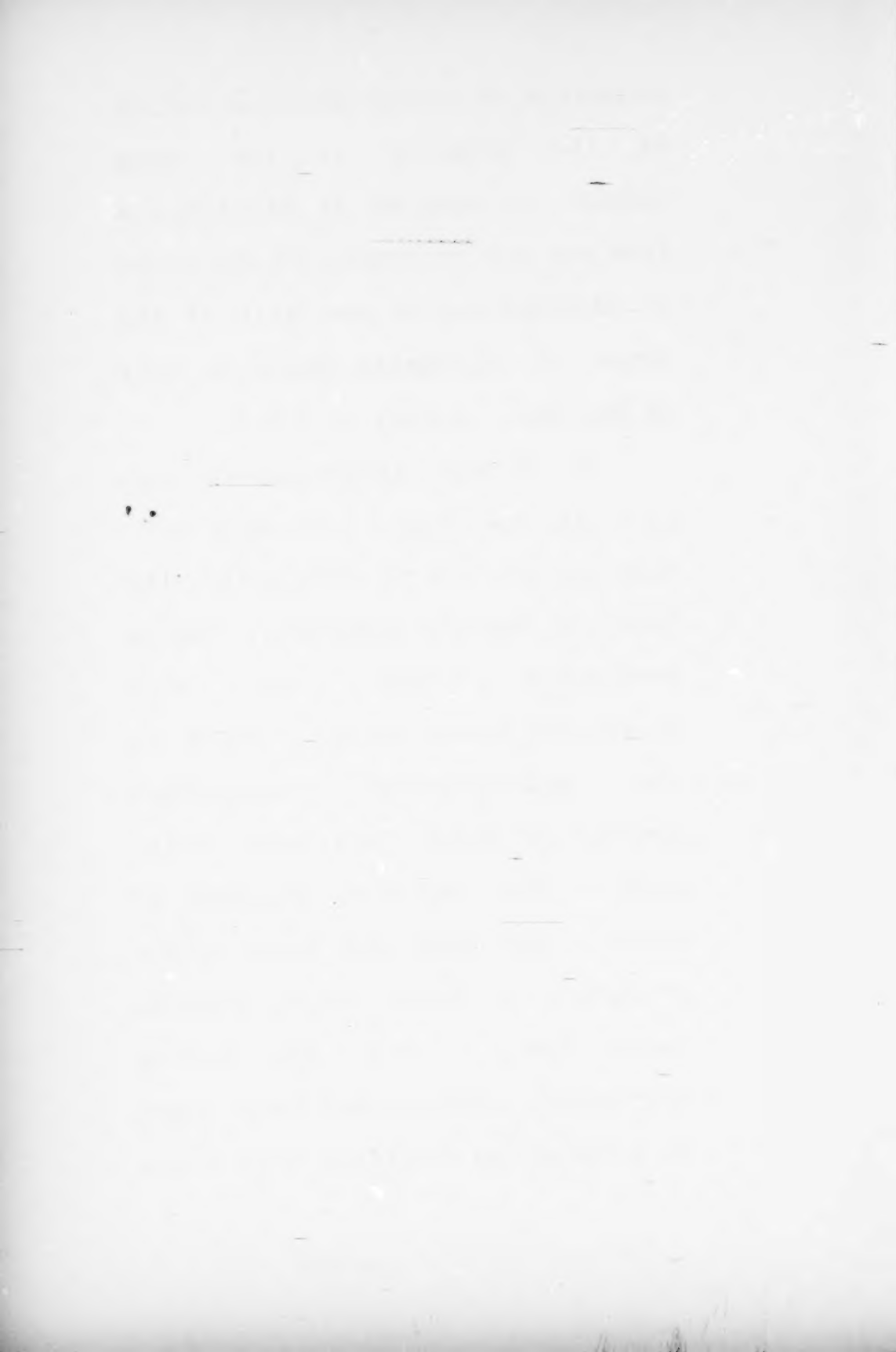


sought to demolish the building and erect an office building at the site. However, the Landmarks Preservation Law prohibited its demolition and replacement. No compensation was provided for this economic hardship to the religious corporation. The Court of Appeals granted a judgment declaring that this "landmark designation" amounted to a void and unconstitutional confiscation of the corporation's property. (US Const 5th, 14th Amends; NY Const, Art I, §§6, 7.) The court quoted its prior holding in Forster v. Scott (136 NY 577) by stating that "[i]t is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect



authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner' ." (Lutheran Church v. City of New York, supra, at 130.)

In French Investing Co. v. City of New York, (39 NY2d 587, cert denied, 429 US 990 [1976]) the Court of Appeals analyzed a zoning resolution which made once privately owned parks located in the mid-Manhattan residential complex of Tudor City into public parks. The landowner intended to develop the park for real estate projects, a right which existed under law. The new zoning resolution extinguished that right by prohibiting building over these

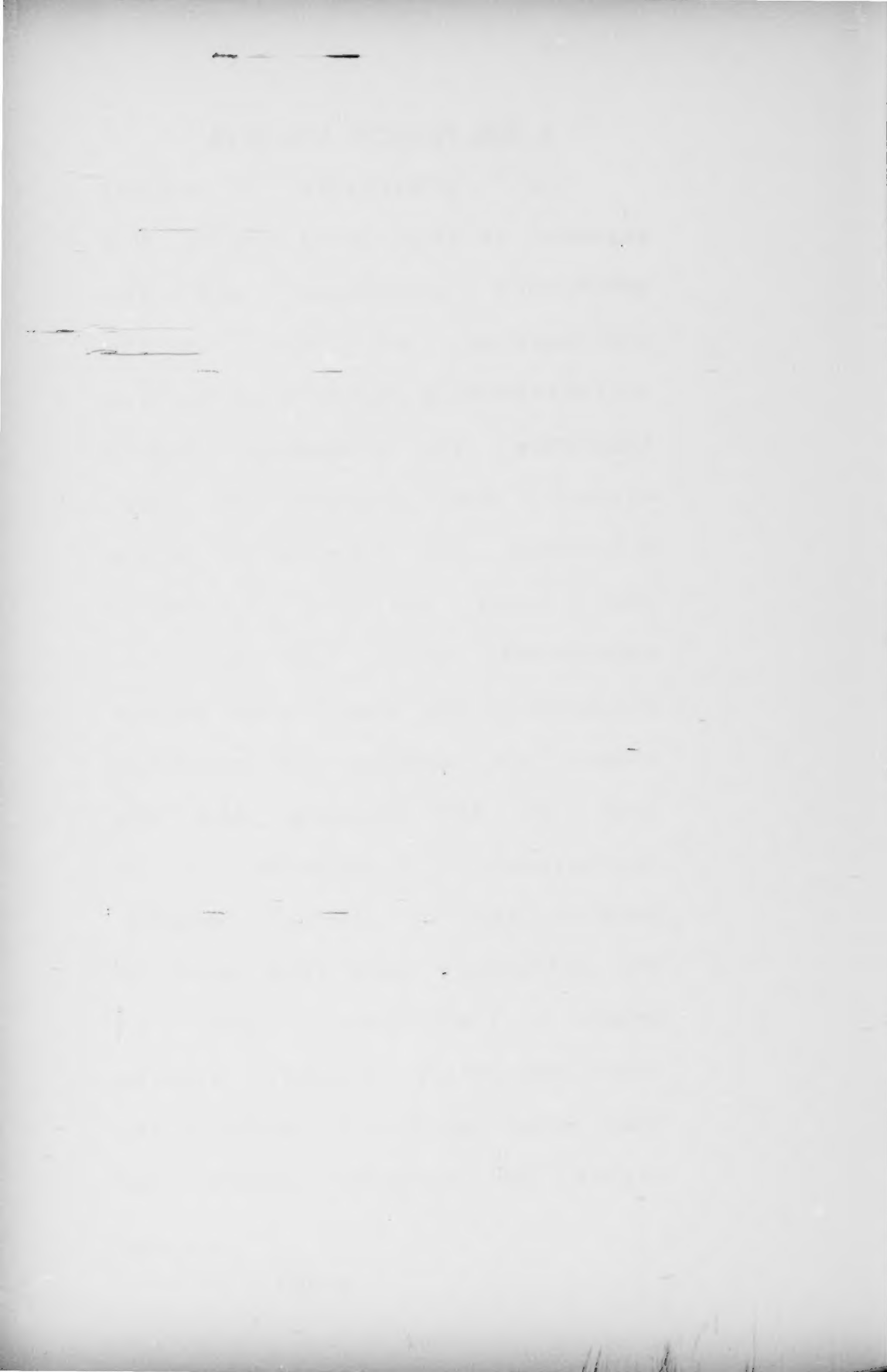


parks. Instead, the law permitted the transfer of developmental rights to other lot locations. The plaintiffs in French challenged the rezoning as an unconstitutional taking. Although the court denied the takings claim it held that the law frustrated the plaintiff's legitimate property rights and expectations for use and therefore constituted a deprivation of due process rights. As such, the regulation was invalidated. Therefore, according to the Court of Appeals, a regulation may violate due process and not constitute a taking (French Investing Co. v. City of New York, supra) or it may constitute both. (Lutheran Church v. City of New York, supra.)



A DUE PROCESS ANALYSIS

The plaintiffs' central argument is that Local Law No. 9's additional provisions and the continuation of the invalid antiwarehousing portions of the law frustrate its property rights without due process of law. Defendants and intervenors argue that Local Law No. 9, which superseded Local Law No. 22, responds to the same issues as the former law, namely, the continued loss of SRO housing and the concomitant increase in homelessness of former tenants. The defendants urge this court to uphold the new law as constitutionally proper, arguing that Local Law No. 9 considers the rights of property owners and



balances them with the needs of tenants as well as providing property owners with a means to escape the acknowledged burdensome aspects of the law.

Do the exemptions that have been added to the law enable the statute to comport with due process standards? I find that the exemptions do not alleviate the constitutional difficulties found in the prior law; they only enlarge them. The statutory cash buyout, in the amount of \$45,000 per unit, which would entitle the owner to remove the unit from the market, constitutes an excessive financial burden. SRO owners must pay \$45,000 to the New York City SRO Development Fund under two circumstances: (1) when the owner



persuades a tenant to move²¹ and (2) when there is a vacant unit which the owner seeks to recover and remove from the market. This statutory buyout is unrelated to land value. The payment may be adjusted downward in the Commissioner's discretion and is apparently related to the assumed cost of building replacement units. However, plaintiffs persuasively argue that even assuming the landowner can ultimately vacate an entire building, the statutory buyout and the privately negotiated fee between tenant and property

²¹This might not be the property owner's only payment. It is common knowledge that under these circumstances an owner would have to offer an inducement or cash buyout to the tenant in occupancy in order to persuade him/her to move.

owner would increase land costs to such a degree that it would render this statutory buy-out option economically unfeasible and illusory. Moreover, this buy-out provision is limited to SRO dwellings where less than 50% of the SRO units were occupied as of January 20, 1987; where a building has 50% or more of the units occupied, the statutory cash buy-out option is foreclosed to the owner.

Plaintiff Testamentum's situation is a prime example of the ironic aspects of the law. Testamentum is a subsidiary of Covenant House, a recognized child-care agency which provides shelter to homeless and neglected children in New York City.

Testamentum's president, Reverend Bruce Ritter, has submitted an affidavit in support of the application for a preliminary injunction restraining the City from enforcing Local Law No. 9. He states that the Times Square Hotel was acquired "in the hope of providing the cornerstone of an endowment to secure the financial future of Covenant House." In acquiring the property, Reverend Ritter asserts that the plaintiff arranged for financing to upgrade the hotel rooms to increase the hotel's transient business until disposition or redevelopment of the site. Testamentum is one of the plaintiffs which are foreclosed from using the buy-out and instead is relegated to the mandatory



replacement plan unless hardship can be shown. Ironically, Testamentum itself, a not-for-profit organization, may ultimately be forced to sell or net lease the building to another not-for-profit corporation.

Moreover, Testamentum, although sympathetic to the rationale behind the enactment of this SRO legislation, contends that its provisions are unconstitutional. Testamentum also persuasively argues that the only available options for withdrawal of the building from the moratorium are so costly, burdensome and vague as to violate due process and constitute a taking.

Plaintiffs also argue that the cost of the buy-out exemption is



tantamount to an illegal tax and would constitute a due process violation. Plaintiffs' argument that the \$45,000 per unit buy-out exemption is an illegal tax is without merit. Taxation is the power by which a sovereign raises revenue to defray necessary expenses of government. Such charges are exacted for public purposes and are of an involuntary nature.²² However, here, the money to be contributed to the SRO Housing Development Fund Company is in the nature of a regulatory fee since the money will not be used for the general support of the government, but will be earmarked

²²58 NY Jur, Taxation, § 1 (rev ed).



to develop low-income housing to replace those units altered or demolished by SRO owners. Moreover, the fee is a voluntary means to escape the regulatory scheme.

However, whether the \$45,000 buy-out exemption is classified as a tax or a regulatory fee, it clearly extracts an exorbitant price for recovery of an owner's property. The record demonstrates that such a cost per unit can be prohibitive and realistically prevent SRO owners from recovering the use of their property. Plaintiff Seawall submits an affidavit stating that it spent \$5,810,000 to acquire its assemblage before the effective date of Local Law No. 22. Seawall



claims that it expended thousands of dollars in relocation expenses to former tenants of its buildings for the purpose of obtaining a voluntary surrender of their units so that it would be able to construct a commercial office building at that site.

The defendants claim that similar regulatory schemes have been upheld in other States. They contend that since the antiwarehousing law enacted in Hoboken, New Jersey, has been upheld by a Federal court, this court should similarly uphold Local Law No. 9. Help Hoboken Hous. v. City of Hoboken (650 F Supp 793 [D NJ 1986]) concerned a city ordinance which was enacted to ease the housing shortage in Hoboken.

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The ordinance required property owners to rent their vacant units within 60 days of the end of the preceding tenancy as opposed to 30 days in the New York law. However, this is where the similarity ends. Unlike New York, New Jersey law authorizes the eviction of statutory tenants where the owner "seeks to retire permanently the residential building * * * from residential use". (NJ Stat Annot § 2A:18-61.1[h].) So, the ability of Hoboken property owners to permanently retire their units from residential use if authorized or to to redevelop their property as cooperatives or condominiums is left intact. Moreover, all property owners are required to shoulder this obligation unlike the



situation existing as a result of New York law where only SRO owners are singled out.

The defendants in support of this SRO legislation admit that the provisions are burdensome but argue that the hardship exemption eliminates the difficulties. The hardship exemption provides for a total or partial reduction in the amount of the cash buyout or the number of dwelling units to be replaced if the Commissioner determines that there is no reasonable rate of return unless the property is altered or converted to another use.

A reasonable rate of return is defined as 8.5% of the property's assessed value as an SRO building. This definition fails to take into



account an owner's initial investment in the property. So, by using this method of computation an owner receiving an 8.5% return on property valued as an SRO would not necessarily receive a fair return on his investment. Furthermore, plaintiff Seawall argues that since real property located in New York City is assessed at 45% of market value, the actual return offered to Seawall and other SRO owners is not 8.5% of market value, but 8.5% of 45% of market value. The defendants fail to dispute this calculation and continue to evaluate the property as if it had no development potential. The



cases²³ cited by the City of New York that found that 4% or 6% were reasonable returns do not hold that the rate of return is to be assessed against the property's current value as opposed to examining an owner's initial investment in the property.

In Northern Westchester Professional Park Assocs. v. Town of Bedford (60 NY2d 492 [1983]) the Court of Appeals found that in determining whether a certain zoning regulation permitted a reasonable rate of return, a petitioner must show proof in dollars and cents of the owner's

²³Felner v. Office of Rent Control, 27 NY2d 692 (1970); Bucho Holding Co. v. Temporary State Hous. Rent Commn., 11 NY2d 469 (1962).



investment in the property as well as the return that the property would produce from the various uses permissible under the existing classification. The court also stated that taxes, expenses and other carrying charges would be considered as well as the cost of many improvements made to the property.

Here, in order to show hardship, an owner would have to demonstrate an inadequate return on an investment based upon the value of the property as if it had no development potential. This total disregard of reasonable "investment backed" expectations on the part of SRO owners violates due process because it is inherently confiscatory. In French Investing



Co. v. City of New York, (39 NY2d 587, 597, supra) the Court of Appeals "recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." In French, the court held that the zoning amendment was unreasonable and unconstitutional because "without due process of law, it deprives the owner of all his property rights, except bare title and a dubious future reversion of full use" (supra, at 597).

The defendants and intervenors argue that the City Council enacted this regulatory scheme in furtherance of the public interest. In support of this argument the



defendants compare Local Law No. 9 with a landmarks preservation law. This analogy is without merit. A landmark is defined as a structure or site which has certain historic, architectural, aesthetic or cultural significance. Landmark preservation laws attempt to protect these unique structures from land-use decisions which might fundamentally destroy or alter their character. Here, SRO buildings have no unique²⁴ importance. In fact, Local Law No. 9 does not even require that replacement buildings be SRO buildings; the units may be removed from the market so long as they are

²⁴Penn Cent. Transp. Co. v. New York City, 438 US 104 (1978).



replaced with some form of low-cost housing. Clearly, any owner of residential property could be enlisted in the effort to provide housing for low-income people and any residential building could be used for that purpose. Moreover, landmark preservation laws normally prevent alteration or demolition of existing structures unless the owner can demonstrate hardship (Penn Cent. Transp. Co. v. City of New York, 42 NY2d 324, aff'd 438 US 104), but if they place an undue and uncompensated burden on the individual owner, they may be held unconstitutional (Lutheran Church v. City of New York, 35 NY2d 121, 129, supra) because such laws force "the owner to assume the cost of providing a benefit to the public



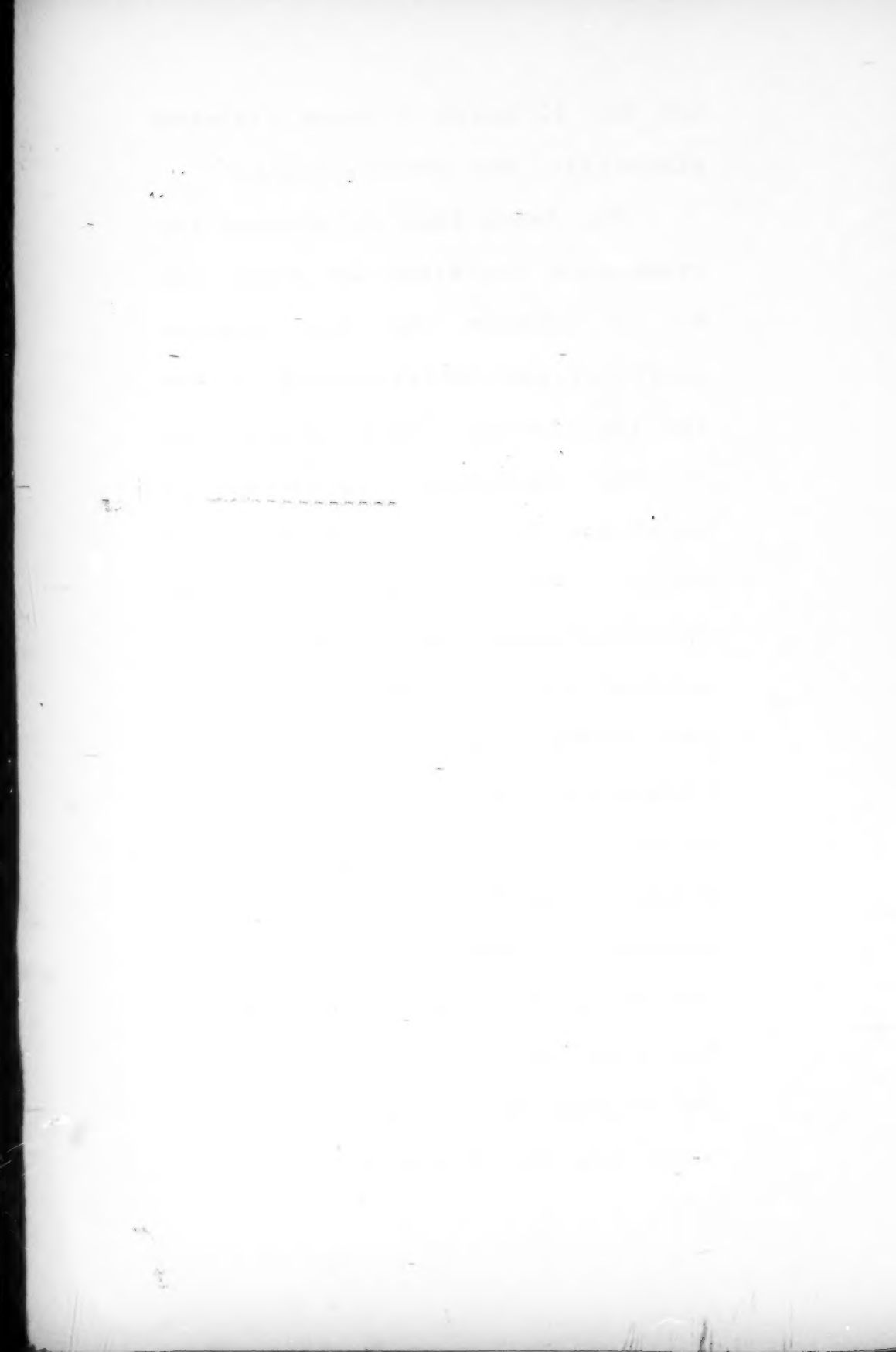
without recoupment" (French Investing Co. v. City of New York, 39 NY2d 587, 596, supra, see also, Dunham, A Legal and Economic Basis for City Planning, 58 Colum L Rev 650, 665, cited in FGL & L Prop. Corp. v. City of Rye, 66 NY2d 111, 120 [1985])). Here, Local Law No. 9 continues the moratorium on altering or converting SRO units; it continues to prohibit withdrawal of SRO's from the rental market and continues to place an affirmative obligation on SRO owners to renovate their buildings.²⁵ These aspects of Local Law No. 9 are identical to its predecessor Local

²⁵ Administrative Code of City of New York § 27-198.2.



Law No. 22 which I found violated plaintiffs' due process rights.

The issue then is whether the exemptions contained in Local Law No. 9 remedy the due process constitutional difficulties of the SRO legislation. Upon examination of the exemptions contained in Local Law No. 9, I find that they fail to alleviate the constitutional infirmities which existed in prior SRO legislation and create additional ones. The exemptions are tantamount to extortion. While purportedly allowing the SRO owners to one day recover the use of the buildings, the law extracts a very high price for exercise of property rights. The regulatory scheme contained in Local Law No. 9 places an unfair



and uncompensated burden on one class of property owners. The legislation in effect forces private individuals to subsidize a low-income housing program administered by the City of New York. Such a regulatory scheme severely interferes with plaintiffs' property rights. Accordingly, I find Local Law No. 9 was enacted in violation of plaintiffs' due process rights.²⁶

²⁶The claims of due process violations are contained in Seawall Associates' first cause of action particularly paragraph 18; Testamentum's first cause of action-paragraph 13; Anbe Realty's paragraphs 16, 26, 27, 28.

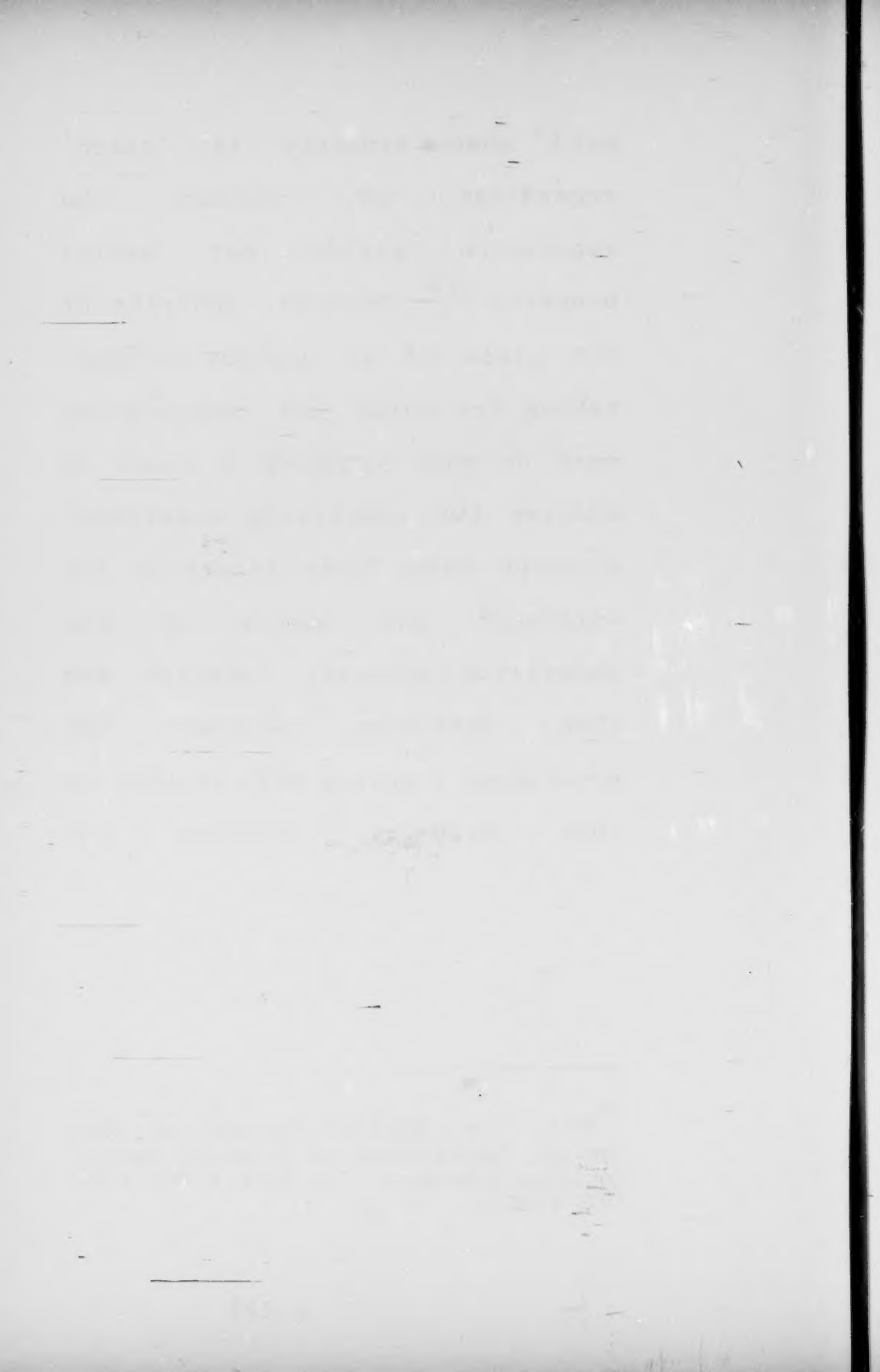
TAKINGS²⁷ ANALYSIS

Having found Local Law No. 9 violates plaintiffs' due process rights the next issue is whether Local Law No. 9's regulatory scheme constitutes an unconstitutional taking for which just compensation must be made. In contrast to a due process analysis, under the takings doctrine, "the government's justifications are essentially irrelevant: compensation must be

²⁷There is some disparity in the literature between the correct nomenclature of the term "taking" and/or "takings" doctrine or analysis. (See, for example, Keystone Bituminous Coal v DeBenedictis, 480 US 470 [1987] ["takings"]); see, Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buffalo L Rev 77 [1974].) There is no difference in meaning between the two usages. In this opinion, the term "takings" will be employed.

paid when property is 'taken' regardless of whether the regulation yields net social benefits."²⁸ However, analysis of the claim of an unconstitutional taking for which just compensation must be made requires a court to address two underlying questions. A court must first ascertain the existence and nature of the underlying property interest and then determine whether the government's action with respect to that property interest has

²⁸ Note, The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests, 100 Harv L Rev 1067, 1079 (1987).



comported with constitutional requirements.²⁹

Although the United States Supreme Court, in discussing the Takings Clause has engaged in ad hoc factual inquiries, the court has identified certain broad factors which are relevant in determining whether there has been a taking for Fifth Amendment purposes: (1) the character of the governmental actions, specifically whether the interference with the property constitutes a "physical invasion * * * [or whether it results] from some public program adjusting the benefits and burdens of economic life to promote the

²⁹ Note, Justice Rehnquist's Theory of Property, 93 Yale LJ 541, 543 (1984).

REPORT OF THE

COMMISSIONERS OF THE

LAND OFFICE

FOR THE YEAR 1887

ALBANY, N. Y.

1888

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common good"³⁰ and (2) "'the economic impact * * * on the claimant * * * particularly the extent to which the regulation has interfered with investment backed expectations.'"³¹

The United States Supreme Court had few opportunities³² to

³⁰Penn Cent. Transp. Co. v New York City, 438 US 104, 124; see also, Loretto v Teleprompter Manhattan CATV Corp., 458 US 419.

³¹Judson, Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion, 18 Harv Civ Rights-Civ Liberties L Rev 179, 204 (1983); see also, Annotation, Supreme Court's Views As To What Constitutes "Taking," Within Meaning of Fifth Amendment's Command That Private Property Not Be Taken For Public Use Without Just Compensation, 57 L Ed 2d 1254.

³²However, the New York courts in Brick Presbyt. Church v Mayor of City of N.Y. (5 Cow 538 [1826]) examined the Takings Clause in depth. The Presbyterian church had been granted title to lands on the
(Footnote Continued)

consider the taking issue in the first half of the 19th century.³³

The court began its expansion of the Takings Clause in the latter part of the 19th century enlarging

(Footnote Continued)

outskirts of the city for a church and cemetery. As the city grew, the cemetery became a health hazard and an ordinance was passed forbidding use of the property for burials. The ordinance left the church with almost no other use for its property and deprived the parish of a place to bury its dead. Yet, the court found in the city's favor, primarily upon the ground that the ordinance was promulgated in furtherance of the health and general welfare of the citizens of New York and that, therefore, the church's property rights had to yield to the public welfare. (As cited in Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buffalo L Rev 77, 96.)

³³ Prior to the 19th century, the principle that "the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America. Uncompensated takings were frequent and found justification first in appeals to the crown and later in republicanism".

(Footnote Continued)

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the Bill of Rights to cover actions by the States. These decisions invariably upheld the local exercise of police power "despite the adverse impact on economic investment".³⁴ However, in Pennsylvania Coal Co. v Mahon (260 US 393 [1922]) the Supreme Court began to change the trend of upholding State actions as a valid exercise of police power. Pennsylvania Coal stands for the proposition that a State statute that substantially furthers

(Footnote Continued)

(Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale LJ 694 [1985].)

³⁴ Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buffalo L Rev 77, 98.

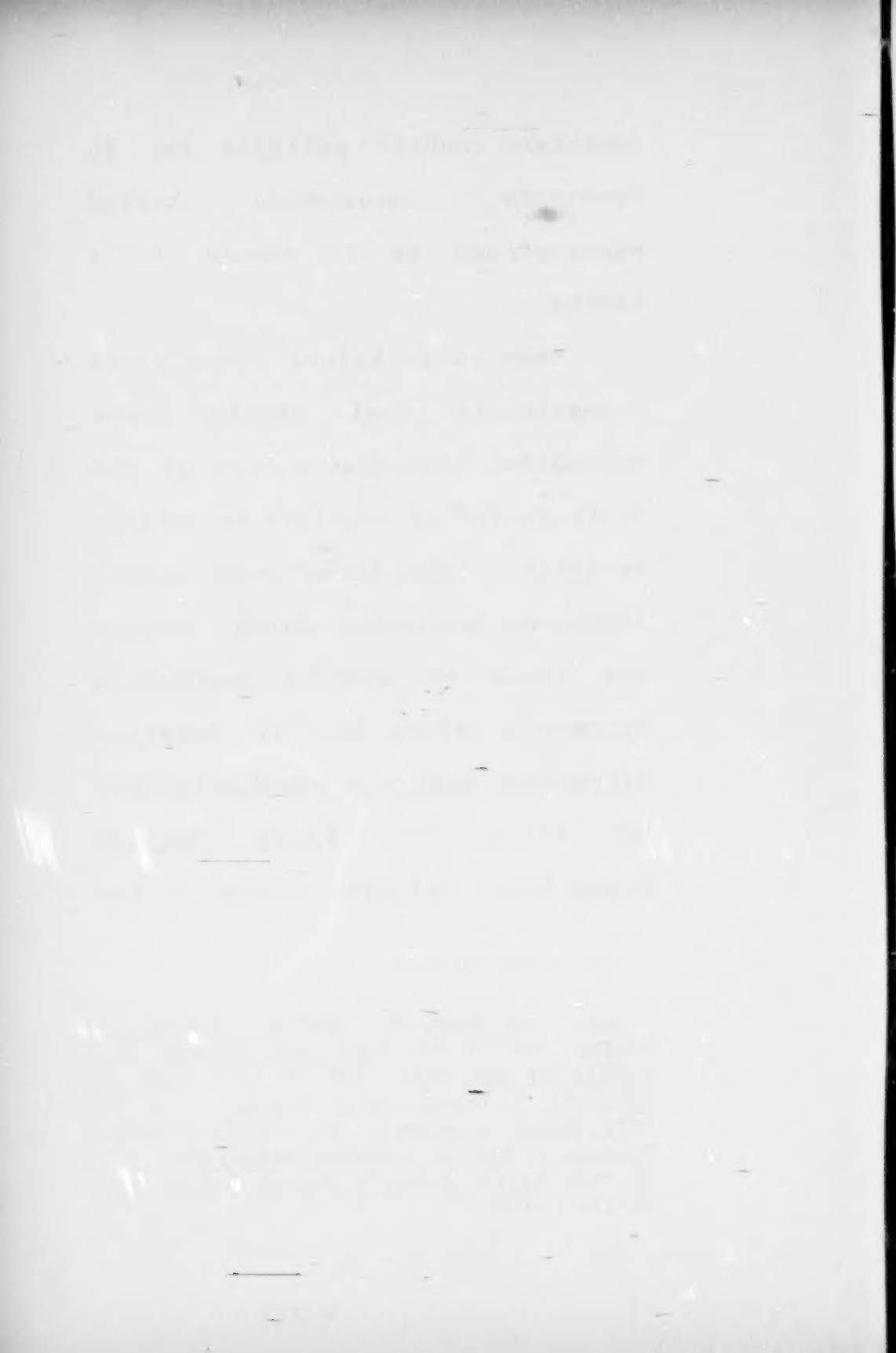
The first of these is the fact
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important public policies may so frustrate investment backed expectations as to amount to a taking.

Many cases before³⁵ and after Pennsylvania Coal (supra) have recognized that the nature of the State action is critical in takings analysis. The three most recent land-use decisions which involve the issue of when a regulation becomes a taking are: (1) Keystone Bituminous Coal v DeBenedictis (480 US 470); (2) First English Evangelical Lutheran Church v Los

³⁵ See, for example, United States v Causby, 328 US 256; Penn Cent. Transp. Co. v City of New York, 438 US 104; City of Eastlake v Forest City Enters., 426 US 688; Welch v Swasey, 214 US 91 (1909); Village of Euclid v Ambler Realty Co., 272 US 365; Kaiser Aetna v United States, 444 US 164 (1979).



Angeles County (482 US __, 96 L Ed 2d 250, 107 S Ct 2378); and (3) Nollan v California Coastal Commn. (483 US __, 97 L Ed 2d 677, 107 S Ct 3141.)

In Keystone Bituminous Coal (supra) an association of coal mine owners sued the Pennsylvania Department of Environmental Resources (DER) in a civil rights action seeking an injunction against enforcement of the Bituminous Mine Subsidence and Land Conservation Act (the Subsidence Act). The owners argued that section 4 of the act, which required that 50% of the coal beneath protected structures, such as public buildings and cemeteries, be kept in place to provide surface support, constituted a taking of



The first part of the report is devoted to a general description of the project and its objectives. It is followed by a detailed account of the work done during the period covered by the report. The results of the work are then presented, and a conclusion is drawn from the findings. The report is intended to provide a clear and concise summary of the work done, and to serve as a basis for further discussion and action.

The project was carried out under the supervision of the Director of the Department of Science and Technology, and the results have been found to be of great interest and value. It is hoped that the information contained in this report will be of use to other workers in the field, and that it will lead to further progress in the study of the subject.

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their private property without compensation in violation of the Fifth and Fourteenth Amendments. The owners asserted that the resolution of their takings claim was governed by the principles enunciated by Justice Oliver Wendell Holmes in Pennsylvania Coal Co. v Mahon (260 US 393 [1922], supra). In that case, the petitioner asserted that Pennsylvania's Kohler Act of 1921 which prohibited mining that caused subsidence under certain structures entitled them to an injunction. In its argument before the Supreme Court, the petitioner coal company contended that the Kohler Act was not a valid exercise of the police power but in reality was nothing more than "'robbery under the forms

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of law'" because its purpose was
"not to protect the lives or safety
of the public generally but merely
to augment the property rights of a
favored few." (Pennsylvania Coal

Co. v Mahon, supra, at 397-398.)

The Supreme Court, in a decision
written by Justice Holmes, agreed
with petitioner's claim and stated:
"As long recognized, some values
are enjoyed under an implied
limitation and must yield to the
police power. But obviously the
implied limitation must have its
limits, or the contract and due
process clauses are gone. One fact
for consideration in determining
such limits is the extent of
diminution. When it reaches a
certain magnitude, in most if not
in all cases there must be an

exercise of eminent domain and compensation to sustain the act."³⁶

In the Kohler Act, under challenge in the Pennsylvania Coal case (supra), the State of Pennsylvania prohibited mining that caused subsidence and barred the coal company from asserting any rights against surface owners who had released their right to support. This statute was said to constitute special legislation for the sole benefit of the surface owners and the act could only be sustained as constitutional if just compensation had been paid to the owners. In Keystone Bituminous Coal v DeBenedictis (supra) the

³⁶Pennsylvania Coal Co. v. Mahon, 260 US 393, 413.

court found that the Subsidence Act differed from the Kohler Act in critical ways. In Pennsylvania Coal, the court believed that the State had acted only to ensure against damage to some private landowners' homes whereas in Keystone, the State was acting to protect the public interest in the health, environment and the fiscal integrity of the area. The court went on to observe that many cases prior to and subsequent to Pennsylvania Coal have recognized that the nature of the State action is critical in a takings analysis.

However, in First English Evangelical Lutheran Church (supra) the Supreme Court held that payment of just compensation under the Fifth and Fourteenth Amendments was

required even where only a temporary taking under the guise of a land-use regulation had occurred. In that case, the church operated a campground, known as "Lutherglen", which had been flooded and its buildings destroyed following a forest fire which had occurred upstream from the church site. In response to the flooding, the County of Los Angeles adopted an interim ordinance prohibiting any construction within the flood area. The church commenced an action to recover damages alleging that the county had denied it all use of its property. The church also based its claim to recover damages from the township in inverse

condemnation³⁷ and in tort for engaging in cloud seeding during the storm that flooded the church's property. The California lower court dismissed the complaint. The appellate court sustained the second cause of action in inverse condemnation. The United States Supreme Court, in reversing the holding that a temporary taking is not compensable, quoted the words

37" The traditional condemnation proceeding is a judicial action by a public agency, or a private entity to which the power has been delegated to take private property for public use and to determine compensation for the taking * * * [Whereas, i]n inverse condemnation, both the position of the parties and the sequence of the determination of value are inverted -- the erstwhile owner brings action against a public agency, alleging that it has taken his property and demanding compensation." (Magavern, The Evolution and Extension of The New York Law of Inverse Condemnation, 24 Buffalo L. Rev 273, 274 [1974].)

of the Fifth Amendment that "'private property [shall not] be taken for public use, without just compensation.'" (Supra, 482 US, at ___, 96 L Ed 2d, at 263, 107 S Ct, at 2385.) The court held that a landowner who claims that his property had been taken by a land-use regulation may recover damages from the time the ordinance becomes effective until it is finally determined that the regulation constitutes a taking of the property. Moreover, the court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period

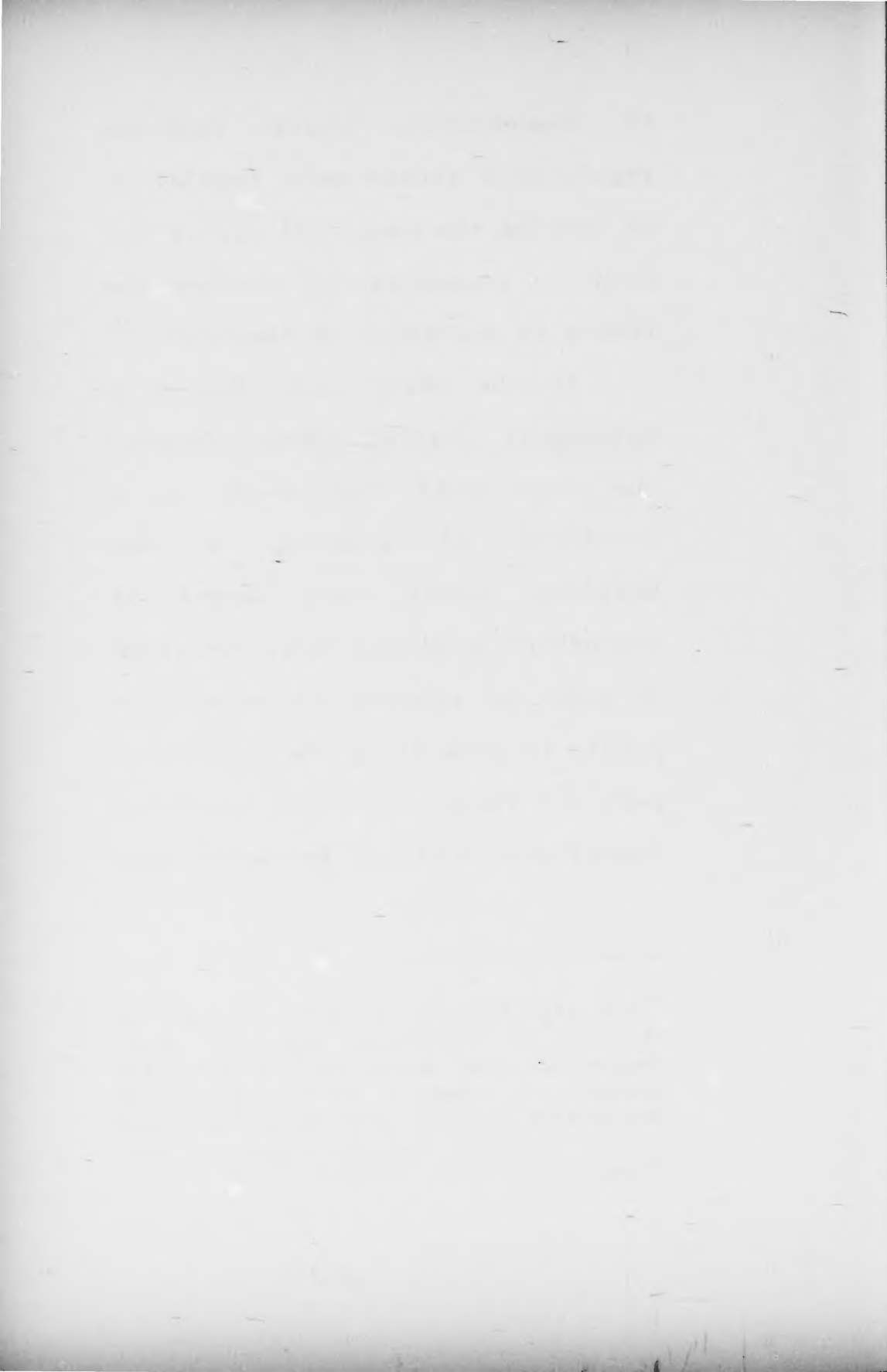


during which the taking was effective." (Supra, 482 US, at ___, 96 L Ed 2d, at 268, 107 S Ct, at 2389.) The court recognized that its holding would limit the freedom of land-use planners and governing bodies of municipalities when enacting land-use measures. However, the court also recognized that in seeking to promote "societal purposes" and improve the public condition the government may take private property; however, upon exercise of that power the sovereign has the "'constitutional obligation to pay just compensation.'" (Supra, 482 US, at ___, 96 L Ed 2d, at 264, 107 S Ct, at 2386.) Thus, the First Evangelical Church decision holds that a property owner is entitled

to compensation where land-use regulations exceed mere regulation by denying the owner all use of his property regardless of whether the taking is permanent or temporary.³⁸

In the third case, Nollan v California Coastal Commn. (supra) the court held that where, as a condition of granting a new building permit, the owners of beachfront property were required to grant an easement to permit the public to pass along the beachfront part of their lot, the condition constituted a taking for which just

³⁸The significance of this decision is that it is the first time the court determined that money was "a potential landowner remedy when government regulations severely restrict private land use." (Callies, Takings Clause -- Take Three, 73 ABA J 48, 53 [Nov. 1987].)



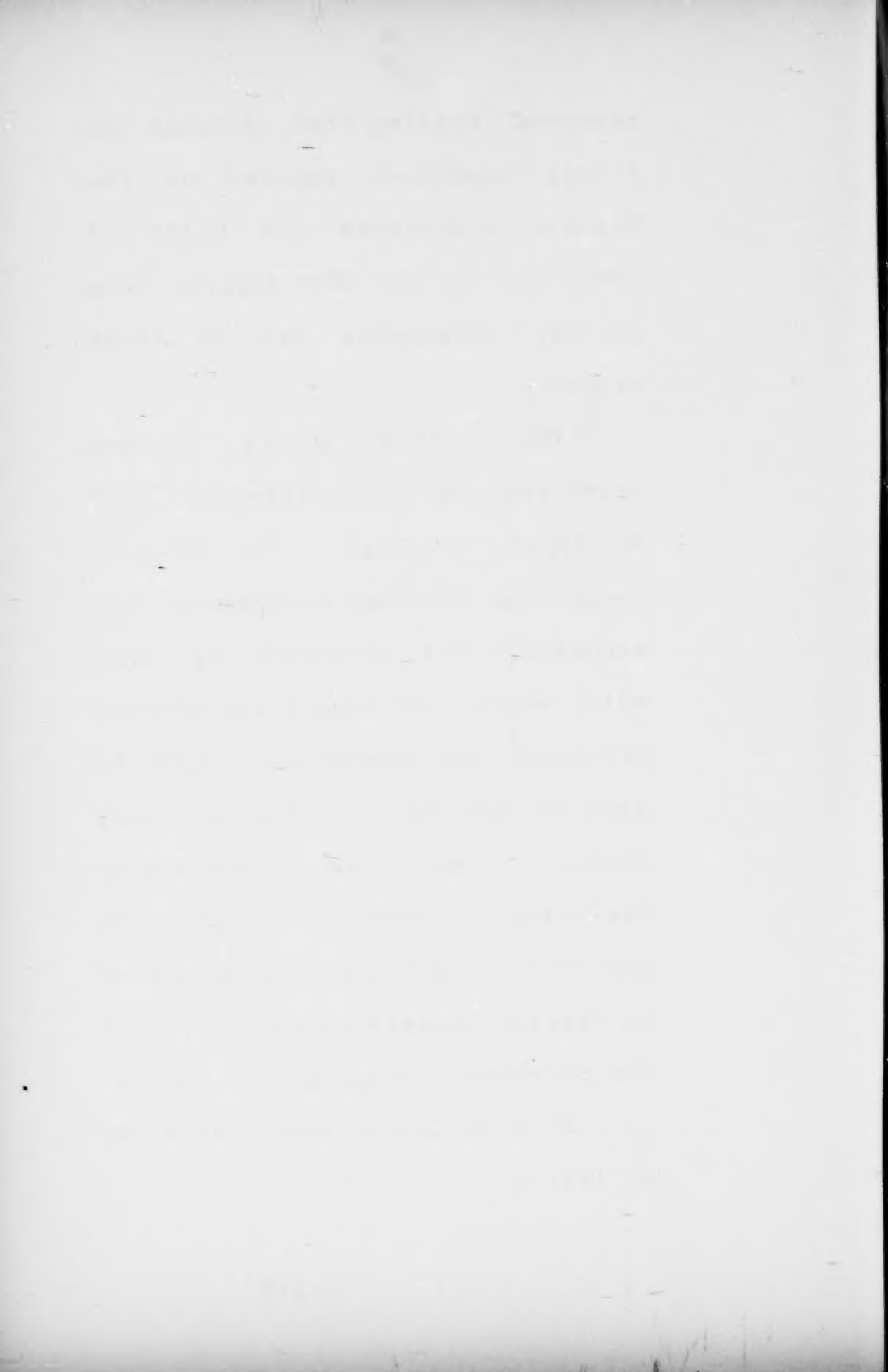
compensation was required to be paid under the Fifth and Fourteenth Amendments.

Petitioners Nollan were owners of a beachfront lot in Ventura County, California, near public parks along the ocean. They applied to the California Coastal Commission to build a three-bedroom house on their lot. The Commission granted the permit on the condition that the Nollans permit an easement allowing the public to pass across a portion of their property. The Nollans appealed to the California Superior Court claiming the imposition of the access condition violated the Takings Clause of the Fifth Amendment. The Superior Court granted the permit; however, the California Court of Appeal

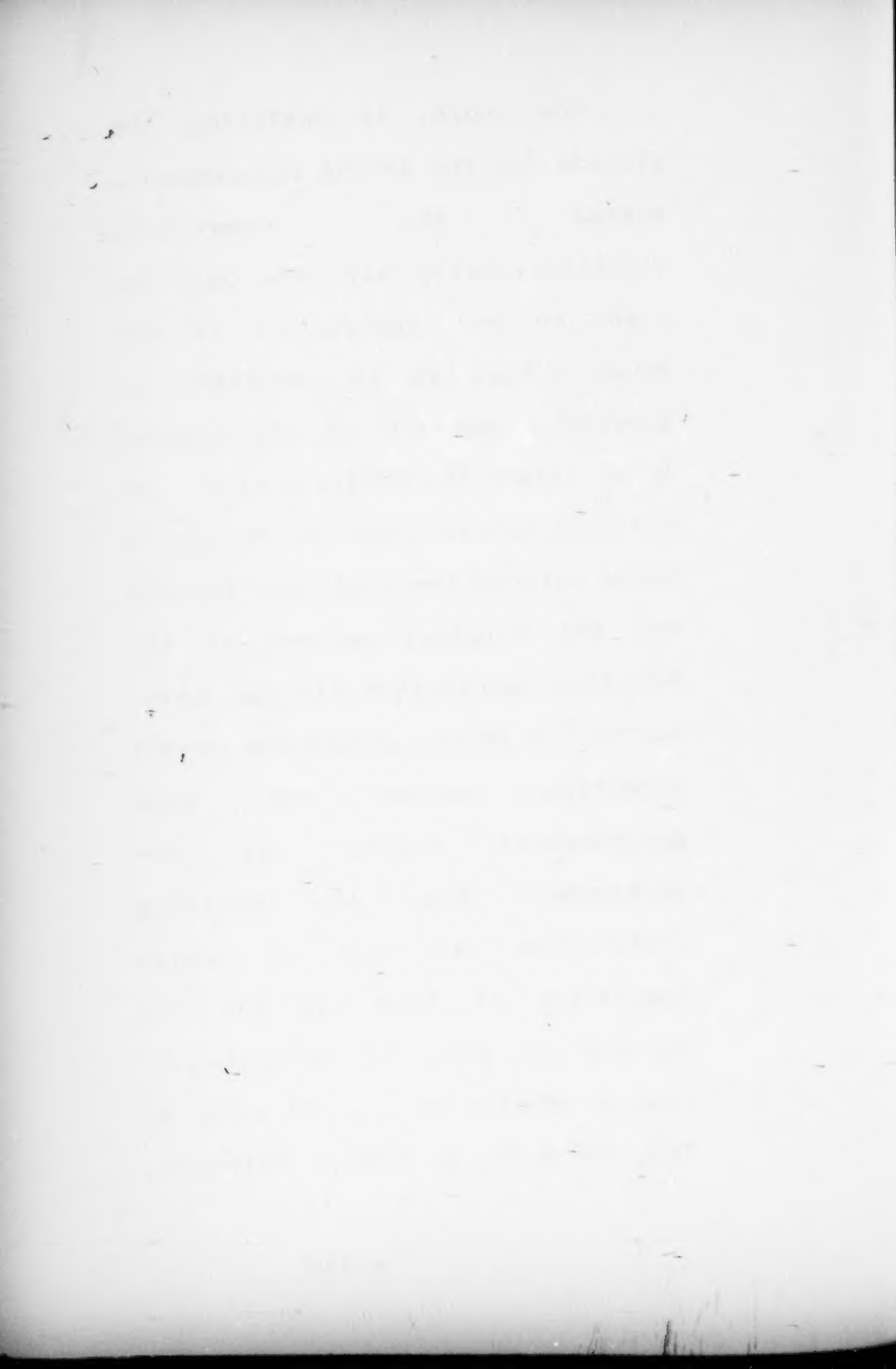


reversed, holding that although the access condition imposed on the Nollans diminished the value of their lot it did not deprive them of all reasonable use of their property.

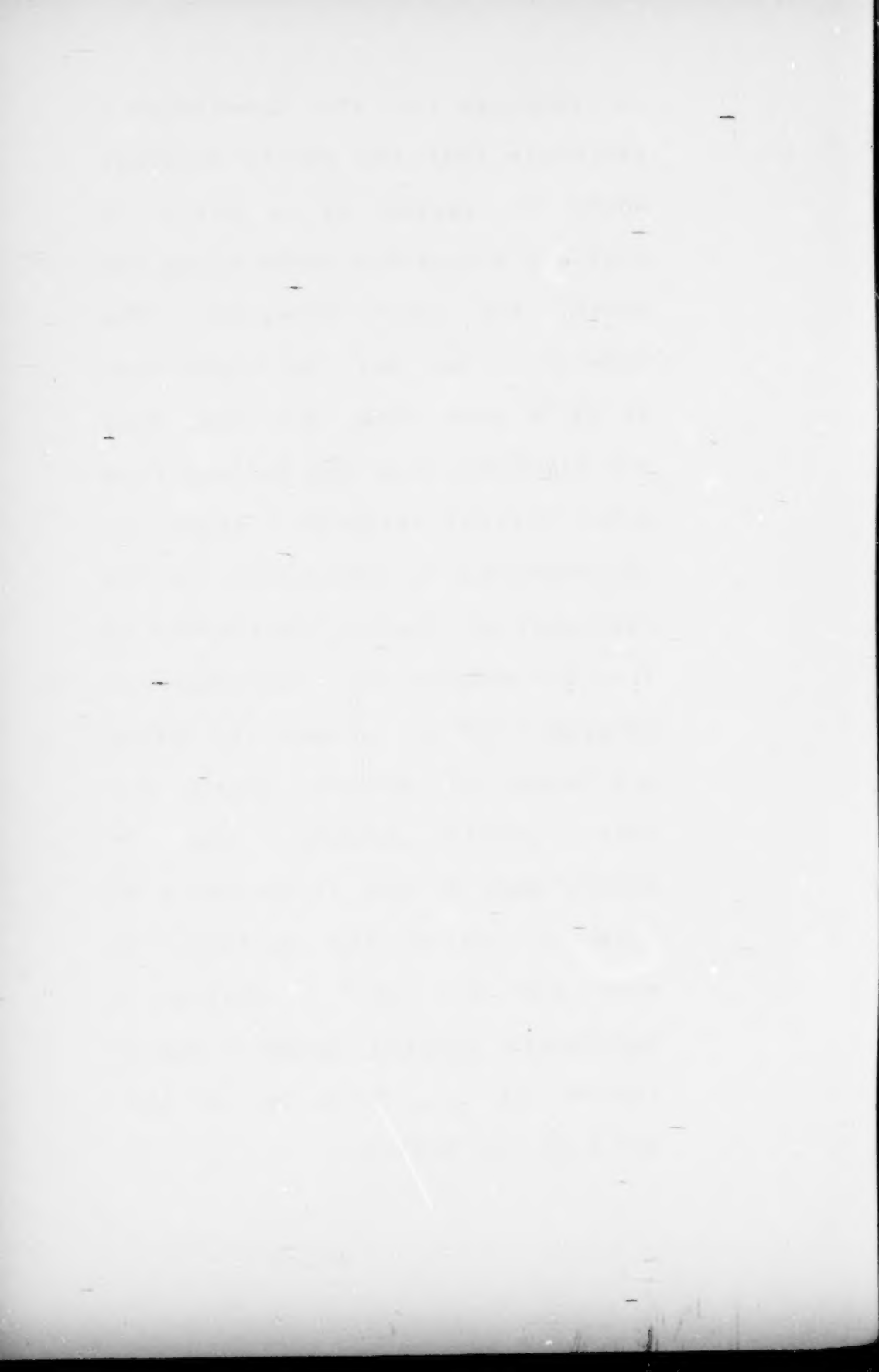
The United States Supreme Court reversed the California Court of Appeal stating: "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may be continually traversed, even though no particular individual is permitted to station himself permanently upon the premises." (Supra, 483 US, at ___, 97 L Ed 2d, at 686, 107 S Ct, at 3145.)



The court, in analyzing the grounds for the access requirement, stated the Commission constitutionally may have had the right to ban construction of the house altogether if necessary to prevent congestion on the beaches or to afford the public a view. It observed however that the necessary nexus between the condition imposed and the original purpose of the building restriction did not exist noting "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (Supra, 483 US, at ___, 97 L Ed, at 689, 107 S Ct, at 3148.) Moreover,

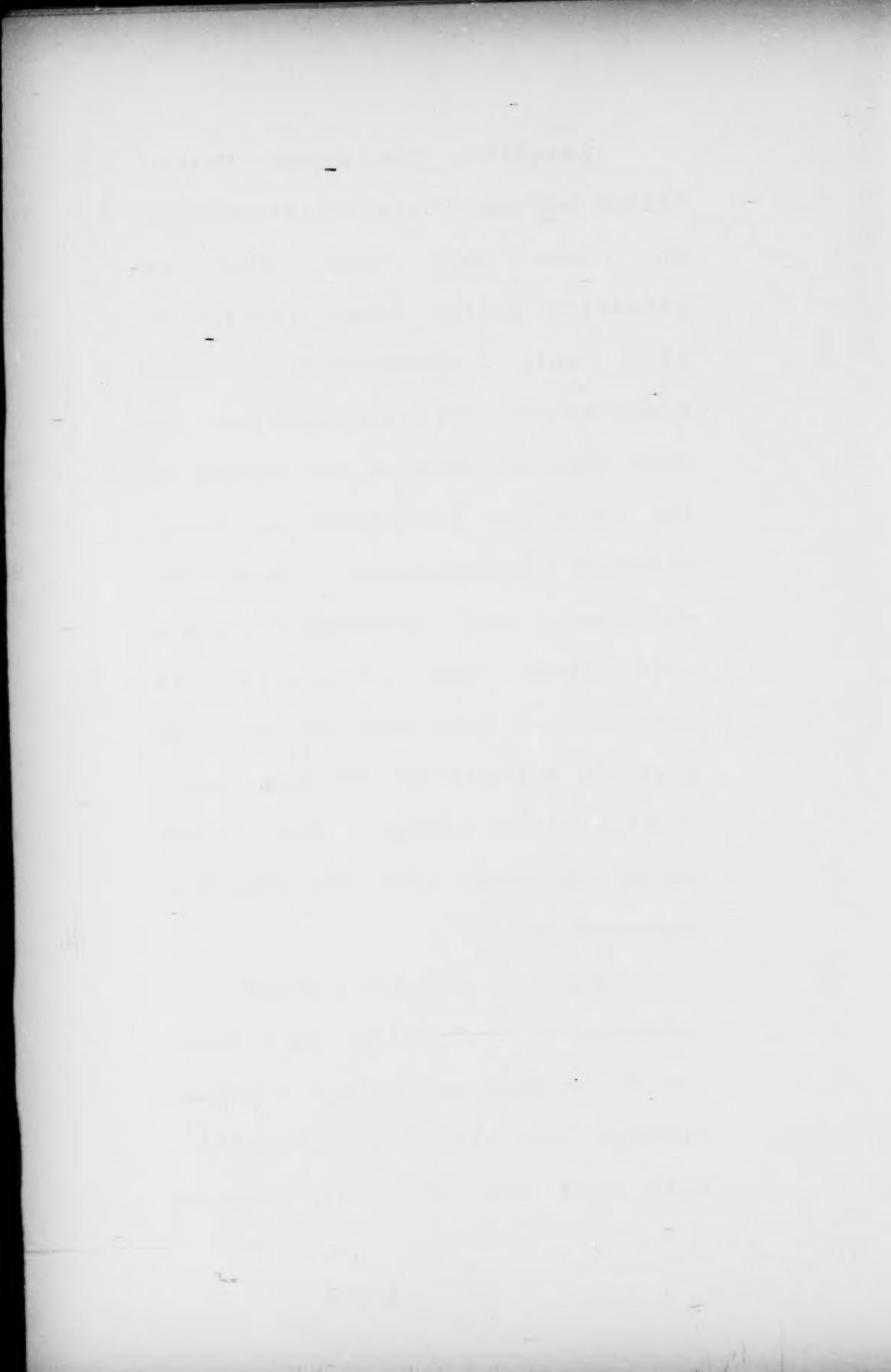


in response to the Commission's rationale that the public interest would be served by a strip of publicly accessible beach along the coast, the court observed, "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see US Const, Amdt V; but if it wants an easement across the Nollans, it must pay for it." (Nollan v California Coastal Commn., supra, 483 US, at ___, 97 L Ed, at 692, 107 S Ct, at 3150.)



Therefore, the recent United States Supreme Court decisions make it clear that even when an excessive police power regulation is only temporary, just compensation must nevertheless be paid from the date of the taking to the date the government or court rescinds the regulation. Here, the defendants and intervenors argue that since the legislation is limited to a five-year period (with possible extensions) the law cannot constitute a taking. But, these recent decisions make that argument unpersuasive.

Equally without merit is defendants' contention that Local Law No. 9 does not effect a taking because the plaintiffs can still make some use of their property



although at a significant financial loss in most cases. In Nollan (supra), the condition imposed upon the petitioners, while diminishing the value of their lot, did not deprive them of all reasonable use of their property. The Supreme Court still found an unconstitutional interference with the Nollans' property rights warranting payment of just compensation.

The Nollan decision (supra) seems to indicate that most regulations will now be subjected to a higher level of scrutiny than that previously utilized in determining claims of regulatory



takings.³⁹ Since Pennsylvania Coal (260 US 393, supra), the court's analysis concerning whether or not a regulation constitutes a taking has focused on the extent to which the regulation diminishes the value of property rights.⁴⁰ But, "[t]he Nollan Court shifted the focus of that analysis from diminution of value to the relationship between the regulation and its goal. As a result, land-use regulations must now overcome a two-part takings test. First, the regulation may

³⁹ Note, The Supreme Court 1986 Term--Leading Cases, 101 Harv L Rev 119, 247 (Nov. 1987); see also, Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1190-1194 (1967).

⁴⁰ See, n 41.



not deny the owner "economically viable use of his land." Second, even if the regulation does not, the Court may rule that the lack of a sufficient 'nexus' between the ends and means makes the regulation a taking."⁴¹ Under this new standard of heightened scrutiny, Local Law No. 9 constitutes a taking without just compensation.

⁴¹101 Harv L Rev 119, 247-248.



CONCLUSION

Local Law No. 9 like its predecessor Local Law No. 22 continues to remove all development rights by interfering with reasonable investment backed expectations. Local Law No. 9 continues to impose affirmative obligations upon owners to rehabilitate their buildings and to rent them to bona fide tenants. The exemptions are vague and only add to the unfairness of this regulatory scheme by extracting a price for the ability of a property owner to develop his property. Moreover, the property owner is still not assured that after all the units have been purchased back and replacement units found that



permission to demolish the building will be granted.

As I stated in Seawall I (134 Misc 3d 187, supra) a severe low-income housing shortage exists in New York City caused by a combination of political, economic and social factors. The solution to this problem does not lie in shifting a governmental obligation to the private sector. The regulations impose an unreasonable and arbitrary scheme and frustrate plaintiffs' property rights without due process of law.

Most of the plaintiffs purchased their buildings prior to the recent spate of SRO legislation. They could not have reasonably foreseen that the venture they initially chose to

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undertake would be this difficult and costly to extricate themselves from. Local Law No. 9 appears to be designed for the purpose of obtaining substantial amounts of money from SRO property owners to fund a new housing program. The City of New York has various options available to it concerning the housing shortage. The city could, for example, remove the moratorium and permit development of the properties to their best use while using the revenue from the increased tax base to fund a public housing program or the city could offer an "upfront" payment to owners who house homeless people and condition this payment upon an



owner's improvement of the building.⁴²

However, the city cannot constitutionally force a single segment of property owners to bear a public burden without just compensation. The current SRO legislation may be innovative, it may be well intentioned; however, it is not constitutional. As Justice Oliver Wendell Holmes once observed, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Pennsylvania Coal

⁴²Oser, Locking in the Stock of SRO's, New York Sunday Times, Mar. 1, 1987, at 6.



Co. v Mahon, 260 US 393, 416,
supra.)

A violation of constitutional due process and the Takings Clause without payment of just compensation constitutes irreparable injury. The plaintiffs have complied with the requirements for preliminary injunctive relief by showing irreparable injury, a likelihood of success on the merits, and an inadequate remedy at law and a balancing of the equities in their favor (Albini v Solork Assocs., 37 AD2d 835). Further, the plaintiffs have demonstrated their entitlement to a permanent injunction.

Accordingly, plaintiffs are granted summary judgment on the claims seeking declaratory and



injunctive relief as follows: I declare that the buy-out, replacement and hardship provisions of Local Law No. 9 violate plaintiffs' due process rights and constitute a taking of their property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the US Constitution. Those provisions of Local Law No. 9 imposing affirmative obligations on plaintiffs to rehabilitate all vacant SRO units and compelling owners to rent them to bona fide tenants similarly violate plaintiffs' due process rights. These provisions are declared invalid and the defendants are enjoined from enforcing them. Plaintiffs are granted leave to



amend their complaints to include a
cause of action for damages.



Local Law No. 9 of 1987

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to prohibiting the conversion, alteration and demolition of single room occupancy multiple dwellings during a serious public emergency.

Be it enacted by the Council as follows:

Section 1. Section 27-198.2 of the administrative code of the city of New York, as added by local law number fifty-nine of nineteen hundred eighty-five and as amended by local law number twenty-two and seventy-three of nineteen hundred eighty-six and local law number of



one of nineteen hundred eighty-seven is hereby re-enacted.

§2. Such section is amended to read as follows:

§27-198.2 Conversion alteration and demolition of single room occupancy multiple dwellings prohibited a. Except as otherwise provided in this section and notwithstanding any other provision of law to the contrary no single room occupancy dwelling unit or units or portions thereof (i) shall be altered for or converted to use as apartments whether such alteration or conversion is effected with or without physical alteration or (ii) shall be altered for or converted to use other than as single room occupancy dwelling units, whether such alteration or

conversion is effected with our without physical alterations, or (iii) shall be altered to add either kitchens or bathrooms if such units lacked either of such facilities as of January ninth, nineteen hundred eighty-five or to remove such facilities. No single room occupancy multiple dwelling shall be altered to reduce the number of single room occupancy dwelling units and no single room occupancy multiple dwelling shall be demolished. No single room occupancy multiple dwelling shall be altered to remove kitchens or bathroom facilities which are used for any single room occupancy dwelling unit.

b. For the purposes of this section the term "single room



occupancy multiple dwelling" means a multiple dwelling which is either (i) a class A multiple dwelling which is either used in whole or in part for single room occupancy or as a rooming house or furnished room house pursuant to section two hundred forty-eight of the multiple dwelling law or which contains rooming units or (ii) a class B multiple dwelling including without limitation, hotels, lodging houses and furnished room houses. Notwithstanding the foregoing provisions, the term "single room occupancy multiple dwelling" shall not include:

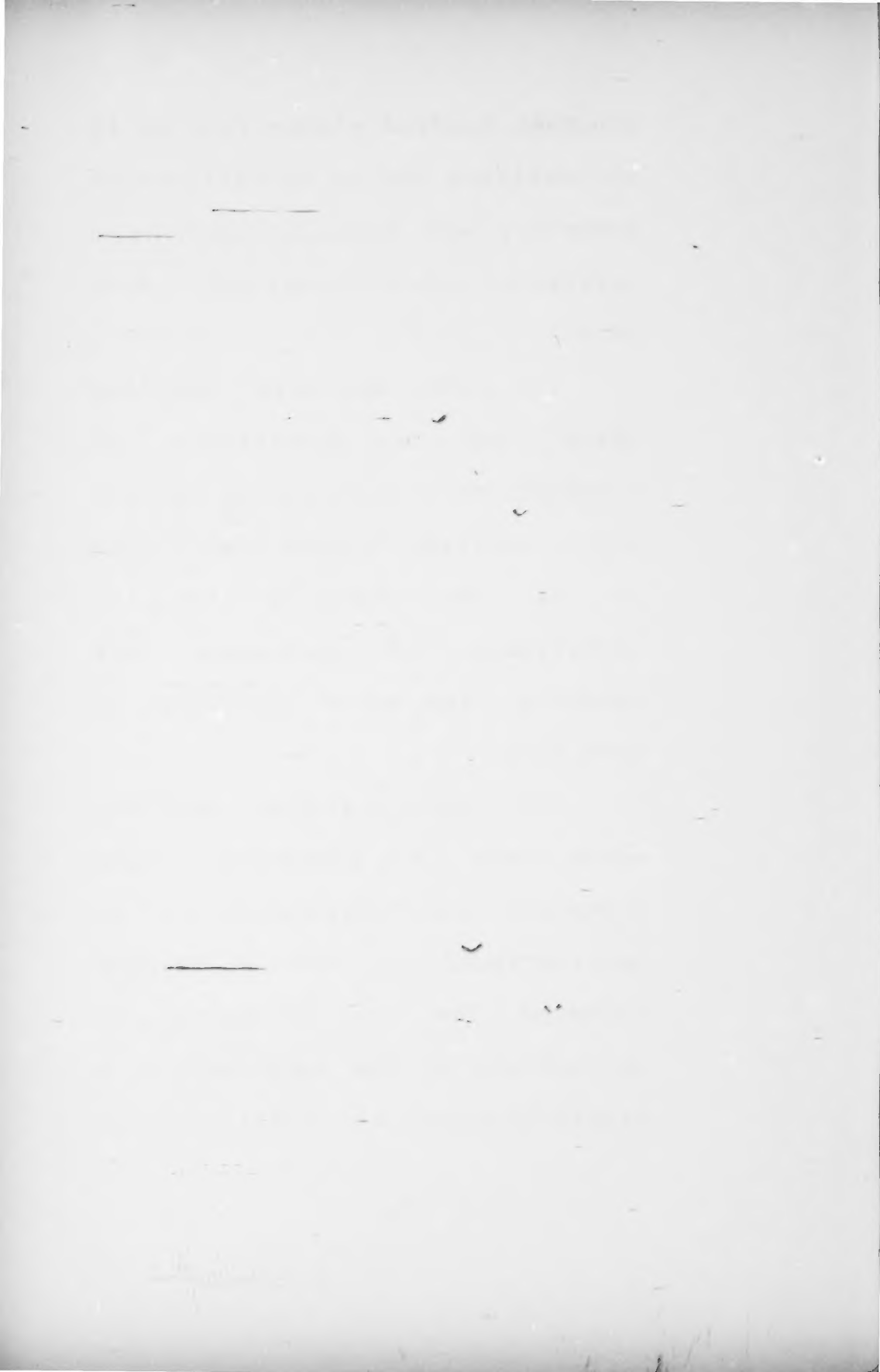
(a) any multiple dwelling which had a certificate of occupancy as a college or school dormitory on January ninth,



nineteen hundred eighty-five or if the dwelling had no certificate of occupancy was lawfully used as a college or school dormitory on such date;

(b) any multiple dwelling which had a certificate of occupancy as a clubhouse on January ninth, nineteen hundred eighty-five or if the dwelling had no certificate of occupancy was lawfully used as a clubhouse on such date;

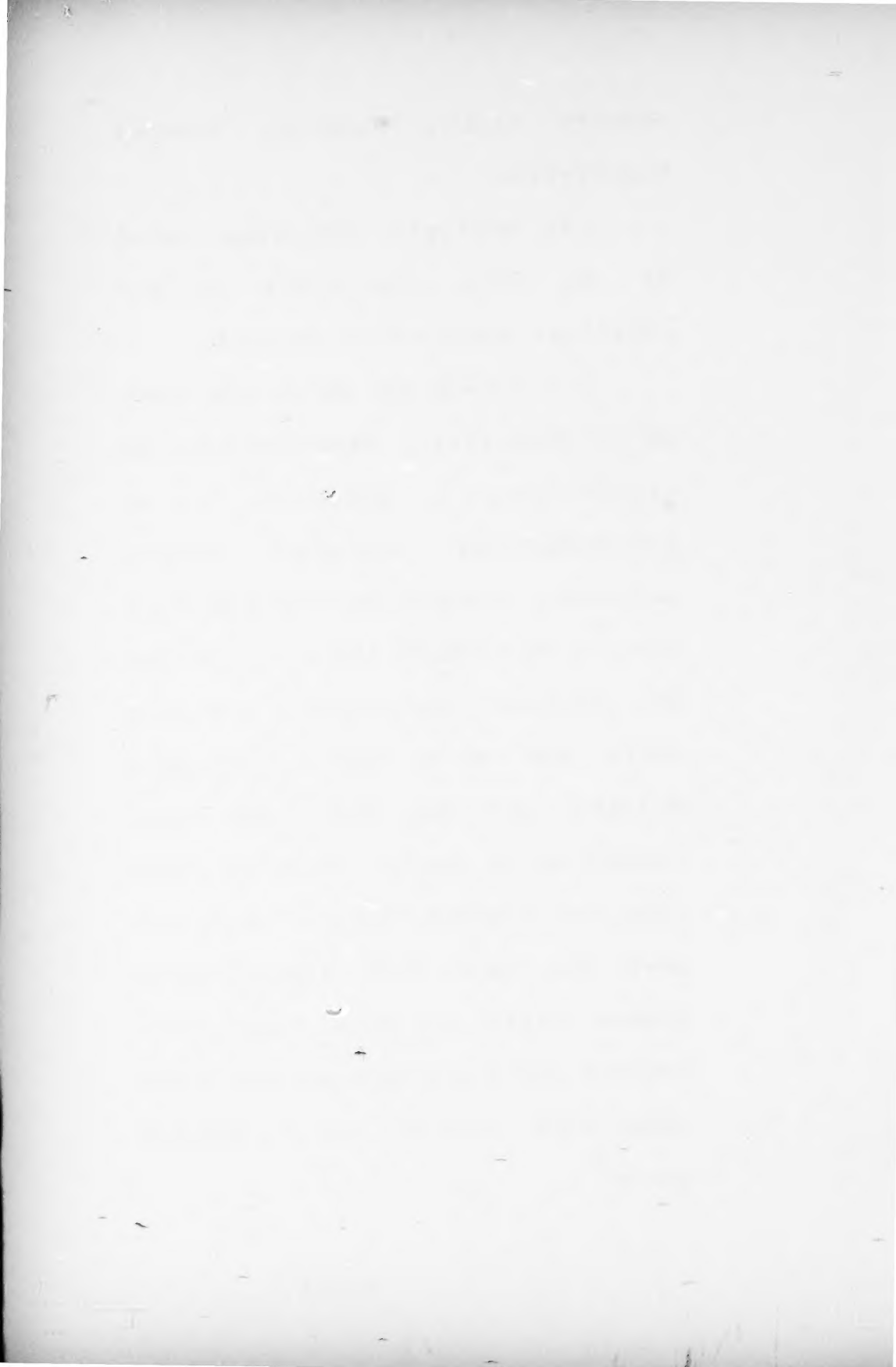
(c) any multiple dwelling which was a residence whose occupancy was restricted to an institutional use such as housing intended for use primarily or exclusively by the employees of a single company or institution on



January ninth, nineteen hundred eighty-five;

(d) multiple dwellings owned by the city, the state or any political subdivision thereof;

(e) hotels in which the rent on October first, nineteen hundred eighty-four, exclusive of governmentally assisted rental payments, charged for seventy-five percent or more of the total number of occupied individual dwelling units was more than fifty-five dollars per day for each unit rented on a daily basis or more than two hundred fifty dollars per week for each unit rented on a weekly basis or more than eight hundred fifty dollars per month for each unit rented on a monthly basis;



(f) any class A or class B multiple dwelling in which, on January ninth, nineteen hundred eighty-five, either less than five dwelling units were rooming units or dwelling units other than apartments or less than ten percent of the total number of dwelling units were rooming units or dwelling units other than apartments;

(g) any class A or class B multiple dwelling which is (a) the subject of a project or program related to the rehabilitation and preservation of single room occupancy multiple dwellings approved by the commissioner of housing preservation and development other than a program of tax abatement or tax exemption

including, but not limited to programs of tax abatement or tax exemption authorized by subchapter two of title eleven of the code or section four hundred twenty-one-a of the real property tax law and (b) exempted from the provisions of this section by such commissioner;

(h) any wood-frame multiple dwelling;

(i) any hotel in which during the twelve month period commencing on January first, nineteen hundred eighty-four ninety percent or more of the dwelling units were occupied for less than thirty consecutive days by any one occupant and in which there are no dwelling units subject to regulation pursuant to the rent stabilization law of nineteen hundred sixty-nine as



amended, provided however that this provision shall not apply unless an application for exemption is filed with the department of housing preservation and development in such form and containing such information as the department shall prescribe on or before April thirtieth, nineteen hundred eighty-seven.

2. The status of a vacant building as a single room occupancy multiple dwelling shall be determined by its last legal use prior to vacancy.

3. For the purposes of this section the term "single room occupancy dwelling unit" means a dwelling unit, other than an apartment, in a single room occupancy multiple dwelling.



4. For the purposes of this section the terms "apartment," "dwelling unit," "owner" and "rooming unit" shall be as defined in the housing maintenance code.

c. 1. The commissioner shall not approve any plans pursuant to article nine of this subchapter, issue an alteration permit pursuant to article twelve of this subchapter or a demolition permit pursuant to article fourteen of this subchapter for a single room occupancy multiple dwelling:

(a) for the alteration of such dwelling to a class A multiple dwelling to be used in whole or in part for other than single room occupancy purposes or for the demolition of such dwelling or



(b) with respect to the addition or removal of kitchen or bathroom facilities in such multiple dwelling prohibited pursuant to subdivision a of this section, or

(c) with respect to any other alterations or other work prohibited pursuant to subdivision a of this section.

2. Except as provided in paragraph three of this subdivision, the department shall revoke any such permit or approval granted on or after January ninth, nineteen hundred eighty-five.

3. If demolition of a single room occupancy multiple dwelling has been completed pursuant to a permit issued on or after January ninth nineteen hundred eighty-five



and prior to August fifth, nineteen hundred eighty-five the department shall not issue a permit for new construction on the site of such demolished dwelling and shall revoke any such permit for construction issued on or after January ninth nineteen hundred eighty-five unless the owner makes the payment or provides for replacement units pursuant to subparagraph (a) of paragraph (4) of subdivision d of this section for each single room occupancy dwelling unit which was demolished.

4. The provisions of this section shall not apply to work done pursuant to any permit issued by the department prior to January ninth, nineteen hundred eighty-five.

d. The provisions of subdivisions a and c shall not apply to a single room occupancy multiple dwelling if:

1. (a) such multiple dwelling had twenty-four or fewer dwelling units on January ninth, nineteen hundred eighty-five and

(i) on January first, nineteen hundred eighty-three and on January ninth, nineteen hundred eighty-five had seven or fewer occupied single room occupancy dwelling units, excluding any owner occupied single room occupancy dwelling units; or

(ii) an individual owner with at least a fifty percent fee interest in the multiple dwelling establishes to the satisfaction of the commissioner of the department



of housing preservation and development prior to the issuance of any permit by the department of buildings for work which would otherwise be prohibited pursuant to subdivisions a and c of this section that he or she intends to occupy such premises as his or her primary residence for a period of not less than three years after completion of such work; and

(iii) an application to establish an exemption pursuant to this subparagraph is submitted to the department of housing preservation and development and such application is approved by the department; or

(b) such multiple dwelling had twenty-five or more dwelling units on January ninth, nineteen



hundred eighty-five and the residential portion of such dwelling has been continuously vacant since January first, nineteen hundred eighty-three, an application to establish an exemption pursuant to this subparagraph is submitted to the department of housing preservation and development on or before May twenty-ninth nineteen hundred eighty-seven and such application is approved by such department; or

2. such multiple dwelling is within an area for which the department of city planning has issued a special permit prior to January ninth, nineteen hundred eighty-five which was conditioned upon a commitment by the developer to provide dwelling units as set



forth in such special permit to replace the single room occupancy dwelling units which are lost; or

3. such multiple dwelling is determined by the department or by the fire department to be an unsafe building and the department determines there is no alternative to demolition; or

4.(a)(i) Prior to the issuance of a permit for work which would otherwise be prohibited pursuant to subdivisions a and c of this section, the owner of such single room occupancy multiple dwelling complies with the provisions of §27-198.3 of this code and, further, provides for the replacement of the single room occupancy dwelling units which would be altered, converted or



demolished by paying to the single room occupancy housing development fund company established pursuant to subdivision i of this section for each dwelling unit which would be altered, converted or demolished as a result of the work, fifty-five thousand dollars or such other amount which the commissioner of housing preservation and development determines by regulation would equal the cost of creating a dwelling unit, other than an apartment, to replace such single room occupancy dwelling unit. No such regulation shall be promulgated before January first, nineteen hundred eighty-eight provided, however, that on and after such date such regulation shall be promulgated where the



commissioner determines that the cost of creating such a dwelling unit exceeds forty-five thousand dollars. Each regulation shall indicate the manner in which the cost of creating such a dwelling unit was determined. Notwithstanding the foregoing, where fifty percent or more of the dwelling units of such multiple dwelling are occupied as of January twentieth, nineteen hundred eighty-seven, the owner of such multiple dwelling shall be required to provide for replacement units pursuant to clause (ii) of this subparagraph for such units occupied as of such date; or

(ii) Prior to the issuance of a permit for work which would otherwise be prohibited pursuant to



subdivisions a and c of this section, the owner replaces the single room occupancy dwelling units which would be altered, converted or demolished as a result of such work elsewhere within the city by providing dwelling units affordable to persons of low and moderate income, under a plan approved by such commissioner which complies with the provisions of §27-198.3 of this code.

"Replacement" shall include but not be limited to the acquisition of an existing multiple dwelling or the creation of such dwelling units either by the construction of a new multiple dwelling or the substantial rehabilitation of an existing multiple dwelling.

"Multiple dwelling" shall include



but not be limited to a "single room occupancy multiple dwelling."

In the event that an existing multiple dwelling is acquired for the purpose of providing replacement units, such multiple dwelling shall be located in the same or adjacent community board in which the single room occupancy multiple dwelling which is to be altered, converted or demolished is located. Where a replacement Plan is submitted to such commissioner, the commissioner shall give notice to the council member and community board for the community district in which the dwelling units to be provided pursuant to such plan are to be located. Such plan shall provide either for the sale or net lease of the multiple dwelling



containing such dwelling units to a not-for-profit organization or for such other form of transfer of ownership, management or possession of such multiple dwelling approved by such commissioner.

(iii) Notwithstanding the provisions of item (i) or (ii) of this subparagraph, upon the submission of an application for a permit for such work an owner shall make an application for a certification of no harassment or supplemental certification of no harassment pursuant to the provisions of section 27-2093 of this code and if such application is denied by the commissioner of housing preservation and development or a certification is granted and thereafter revoked and



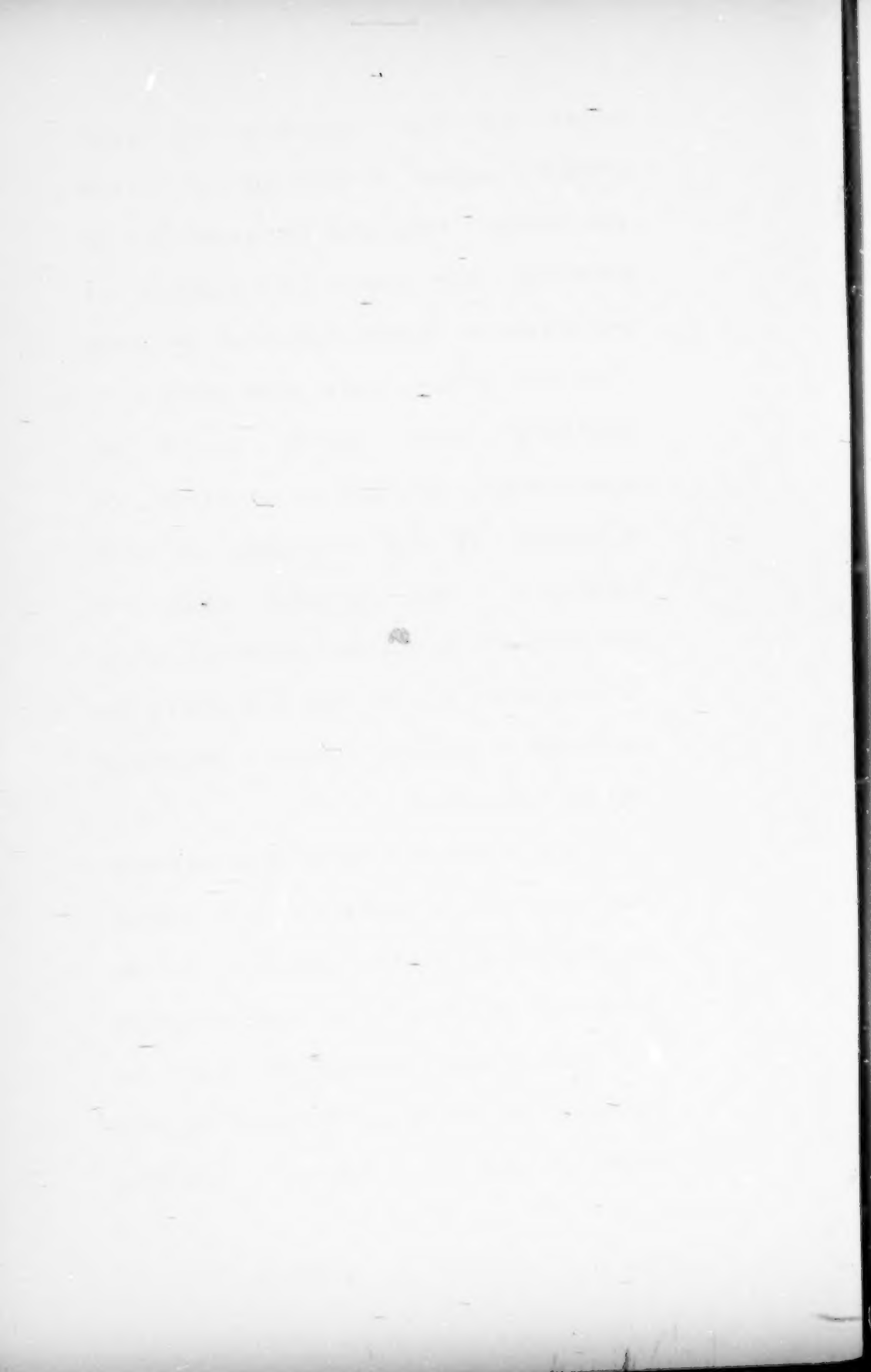
the basis for such denial or revocation is predicated in whole or in part on a determination by such commissioner that harassment occurred at such multiple dwelling after January ninth, nineteen hundred eighty-five, no permit shall be issued on the basis of any payment made pursuant to item (i) or the provision of dwelling units pursuant to item (ii) and such owner shall be subject to the provisions of section 27-2151 of this code and subdivisions a and c of this section. In addition, the sanctions provided by section 27-198 shall apply and no permit shall be issued for a period of two years following the expiration of the sanction period set forth in section 27-198 unless the owner,



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prior to the issuance of such permit, makes a payment of twice the amount required by item (i) or provides for twice the number of replacement units required by item (ii) for each single room occupancy dwelling unit which would be demolished, altered or converted as a result of the issuance of such permit. Any payment made or replacement units provided prior to such denial or revocation shall be credited against such required amount or units.

(b) The amount of the payment required to be made or the number of dwelling units required to be provided pursuant to subparagraph (a) of this paragraph may be reduced in whole or in part by the commissioner of housing



preservation and development if such commissioner determines that the owner has established:

(i) that there is no reasonable possibility that such owner can make a reasonable rate of return unless the property is altered or converted in a manner prohibited by subdivisions a and c of this section or demolished; and (ii) that neither the owner nor any prior owner intentionally managed the property to impair the ability to earn such return, and (iii) that the requirement that all single room occupancy dwelling units be replaced would substantially impair the



feasibility of redeveloping the property for any other use. Such application shall be made to the commissioner of housing preservation and development in a form and manner and containing such information as the commissioner of housing preservation and development shall prescribe. The term "reasonable rate of return" is defined to mean a net annual return of eight and one-half percent of the assessed value of the subject property without recourse to the alteration, conversion or demolition prohibited by subdivisions a and c of this section. If the department of



housing preservation and development determines that the assessed value of the subject property has increased as the result of the sale of such property, such department shall disregard the increase in the assessed value resulting from such sale to the extent that such department determines that the amount paid for the property at such sale was in excess of the fair market value of the property on the date of the sale if the property continued to be used for single room occupancy rental housing of the same type and quality after the sale. For the purpose of such determination



the property shall be valued subject to the continuation of tenancies existing at the subject property immediately prior to the date of the sale. Notwithstanding the foregoing provisions the commissioner shall revoke a determination reducing the payment or the number of replacement dwelling units if the denial or revocation of a certification of no harassment or supplemental certification of no harassment is predicated in whole or in part on a determination by such commissioner that harassment occurred at such multiple dwelling after January ninth, nineteen hundred eighty-five.



e. The department shall not issue a building permit to allow new construction on the site after demolition pursuant to paragraph three of subdivision d of this section unless the owner makes the payment or provides replacement units pursuant to subparagraph (a) of paragraph four of subdivision d of this section for each single room occupancy dwelling unit which is demolished; provided, however, that if the department of housing preservation and development determines that the conditions which necessitated or significantly contributed to the need for the demolition were not the result of violations of the housing maintenance code which resulted from intentional acts or



substantial negligence of an owner or former owner or his or her agent or was the owner of record prior to January ninth, nineteen hundred eighty-five and such acts did not occur during the period of his or her ownership, the owner may apply for a reduction of the required replacement units pursuant to subparagraph (b) of paragraph four of subdivision d of this section.

f. Notwithstanding the provisions of section 27-2077 of the code for the purposes of this section, rooming units for persons of low and moderate income provided pursuant to paragraph two or four of subdivision d of this section may be created through alterations of apartment units in a class A multiple dwelling.



g. i. Any person who violates the provisions of this section shall be subject to all of the remedies and penalties provided for in this title except that no civil or criminal penalties shall apply with respect to acts in violation of this section committed prior to August fifth, nineteen hundred eighty-five.

2. In addition to any other penalties set forth in this subdivision or in any other provisions of law, any person who violates the provisions of this section following August fifth, nineteen hundred eighty-five shall also be liable for a civil penalty in the amount of one hundred fifty thousand dollars for



each single room occupancy dwelling unit unlawfully altered, converted or demolished.

3. An owner who falsely represents an intention to occupy a dwelling in order to obtain a permit pursuant to clause (ii) of subparagraph (a) of paragraph one of subdivision d of this section, to do work which would otherwise be prohibited pursuant to subdivisions a and c of this section shall be liable for a civil penalty of fifty thousand dollars for each single room occupancy dwelling unit demolished or converted to use as apartments under such permit.



4. Such civil penalties shall be recovered by the corporation counsel in an action in any court of competent jurisdiction. A judgment recovered in such an action shall constitute a lien against the premises with respect to which the violation occurred from the time of the filing of a notice of pendency in the office of the clerk of the county in which such premises is situated. A notice of pendency may be filed at the time of the commencement of this action or any time before final judgment or order.

5. In addition to any other penalties set forth in this



subdivision or in any other provisions of law, the commissioner shall either (i) refuse to issue or shall seek to have revoked the certificate of occupancy of a dwelling which has been altered, converted or demolished after August fifth, nineteen hundred eighty-five to reduce the number of single room occupancy dwelling units in violation of this section unless the owner makes the payment or provides replacement units pursuant to subparagraph (a) of paragraph four of subdivision d of this section for each single room occupancy dwelling unit which was unlawfully altered,



converted or demolished, provided, however, that such owner shall not be eligible for a reduction in such payment pursuant to subparagraph (b) of paragraph four of subdivision d of this section; or (ii) order any single room occupancy multiple dwelling to be restored so that the number of single room occupancy dwelling units is increased up to the number of such units prior to such alteration or conversion.

h. All applications submitted pursuant to this section shall be accompanied by an affidavit of the owner attesting to the accuracy and truthfulness of the information contained therein and an



application fee. The department of housing preservation and development is authorized to establish such reasonable fees as may be appropriate.

i. The commissioner of housing preservation and development shall establish a single room occupancy housing development fund company pursuant to the provisions of article eleven of the private housing finance law or such other provision of law as may be deemed appropriate by the corporation counsel. Monies paid to the company shall be used for the preservation, acquisition and development of dwelling units for persons of low and moderate income pursuant to applicable provisions of law and a preference in the



occupancy of such dwelling units shall be given to individuals who are of low income, are single adults and whose last residence was in a single room occupancy multiple dwelling unit which was altered, demolished or converted. On or before June thirtieth, nineteen hundred eighty-eight and annually thereafter the company shall submit a report to the city council and to the mayor describing its activities during the preceding calendar year.

j. All civil penalties recovered pursuant to any provision of this section shall be paid to the single room occupancy housing development fund company established pursuant to subdivision i of this section.



k. The provisions of this section shall not be construed to alter, affect or amend any of the provisions of the emergency housing rent control act, the emergency tenant protection act of nineteen seventy-four or any local laws enacted pursuant thereto, the emergency housing rent control law, the rent stabilization law of nineteen hundred sixty-nine and the local hotel stabilization law of nineteen hundred sixty-nine.

1. For the purpose of this section and §27-198.3, "commissioner of housing preservation and development" may also mean such other agency or office of the city, as the mayor may direct.



§3. Such administrative code is amended by adding a new section 27-198.3 to read as follows:

§27-198.3 Relocation of
tenants in occupancy in certain
single room occupancy multiple
dwellings a. An owner who, pursuant
to either clause (i) or (ii) of
subparagraph (a) of paragraph four
of subdivision d of section
27-198.2 seeks an exemption from
the provisions of subdivisions a
and c of such section shall be
required to offer tenants in
occupancy as of January twentieth,
nineteen hundred eighty-seven or
thereafter, an opportunity for
relocation to a comparable unit at
a comparable rent and such
comparable unit shall be located in
the same borough in which the



single room occupancy unit which is to be exempted is located. Any owner subject to the provisions of subdivisions a and c of such section shall, on or before April first, nineteen hundred eighty-seven, submit to the commissioner of housing preservation and development a sworn statement containing a list of tenants in occupancy as of January twentieth, nineteen hundred eighty-seven. A "tenant in occupancy" shall be defined as an occupant of a dwelling unit within a single room occupancy multiple dwelling who has lawfully occupied such dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit.



b. On or before April first, nineteen hundred eighty-seven, an owner of a single room occupancy multiple dwelling subject to the provisions of subdivisions a and c of section 27-198.2 of this code shall both post in a conspicuous, common area in such multiple dwelling and mail to each occupant on an annual basis thereafter and to each new occupant within ten days of occupancy, a notice in a form approved by the commissioner of housing preservation and development setting forth the rights of tenants in occupancy pursuant to this section and other applicable provisions of law. Such owner shall be subject to a civil penalty of one hundred dollars per day for each and every day that

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such owner fails to mail or to post such notice after April first, nineteen hundred eighty-seven.

c. The commissioner of housing preservation and development shall not authorize the exemption of any single room occupancy dwelling unit from the prohibitions contained in subdivisions a and c of section 27-198.2 of this code unless the owner of such single room occupancy multiple dwelling unit shall submit a sworn statement to such commissioner accounting for all vacancies occurring at such multiple dwelling after January twentieth, nineteen hundred eighty-seven by submitting to such commissioner a sworn statement by each and every tenant in occupancy



at such multiple dwelling on January twentieth, nineteen hundred eighty-seven, or thereafter, who has vacated such multiple dwelling that such tenant was advised by the owner prior to vacating such dwelling of his or her right to remain at such dwelling and his or her right to be offered relocation by such owner pursuant to this section. Where a vacancy has occurred at such multiple dwelling after January twentieth, nineteen hundred eighty-seven and the owner does not submit the affidavit of such tenant, the owner shall submit an affidavit to such commissioner stating either that such tenant wrongfully refused to sign such affidavit or, if the owner lacks knowledge of the cause for such



vacancy setting forth the period of such tenant's occupancy at such multiple dwelling, the date of such tenant's vacating of such multiple dwelling and the circumstances thereof. The commissioner shall have the discretion not to accept an affidavit which such commissioner has reason to believe is substantially or materially inaccurate.

d. Where an owner, pursuant to either clause (i) or (ii) of subparagraph four of subdivision d of §27-198.2 seeks an exemption from the provisions of subdivisions a and c of such section for single room occupancy dwelling units which had tenants in occupancy as of the date of the application for such exemption, such owner shall submit



to the commissioner of housing preservation and development a relocation plan for such tenants. If such plan is approved by such commissioner, the owner shall notify such tenants in a form approved by such commissioner, of their right to elect to accept the offer of relocation pursuant to such plan within the period of ninety days from the date of such notification. A tenant in occupancy who fails to accept such an offer within such ninety day period or rejects such offer shall be deemed to have waived his or her right to relocation pursuant to this section. Upon approval of a relocation plan by such commissioner, the commissioner shall notify those parties who have



registered with the commissioner as being interested in providing tenants in occupancy with alternative offers of relocation.

§4. Article nine of subchapter four of chapter two of title twenty-seven of such code, as added by local law numbers twenty-two and seventy-three of nineteen hundred eighty-six, and amended by local law number one of nineteen hundred eighty-seven, is hereby re-enacted.

§5. Such article is amended to read as follows:

ARTICLE 9

WITHDRAWAL OF SINGLE ROOM
OCCUPANCY DWELLING UNITS
FROM THE RENTAL MARKET
PROHIBITED.

§27-2150. Definitions. For the purposes of this article the terms single room occupancy



multiple dwelling and single room occupancy dwelling unit shall be defined in subdivision b of section 27-198.2 of the code.

§27-2151. Withdrawal of single room occupancy dwelling units from the rental market prohibited.

a. On and after June first, nineteen hundred eighty-seven, an owner of a single room occupancy multiple dwelling which is subject to the provisions of this section shall have a duty (1) to make habitable and maintain in a habitable condition all single room occupancy dwelling units and (2) to rent such habitable single room occupancy dwelling units to bona fide tenants. The duty to rent shall be satisfied by the owner if



the owner has in fact rented all such units to bona fide tenants or has, in good faith, made a continuing public offer to rent such units at rents no greater than the rent authorized by law.

b. The provisions of this section shall apply to all single room occupancy multiple dwellings which are subject to the provisions of subdivisions a and c of section 27-198.2 of the code during the time such subdivisions a and c are in full force and effect except:

1. any single room occupancy multiple dwelling which is exempted or for which an application for exemption from the provisions of subdivisions a and c of section 27-198.2 of the code has been filed



pursuant to paragraphs one, two or three of subdivision d of section 27-198.2; provided, however, that the provisions of this section shall apply to a single room occupancy multiple dwelling on and after the sixtieth day after the date that an application for exemption pursuant to such paragraphs of such subdivision is denied.

2. any single room occupancy dwelling unit with respect to which a payment has been made or a replacement unit has been provided pursuant to subparagraph a of paragraph four of subdivision d of section 27-198.2 of this code.



3. any single room occupancy multiple dwelling for which an application for reduction in payment or replacement units has been made pursuant to subparagraph (b) of paragraph four of subdivision d of section 27-198.2 has been made; provided, however, that an owner shall be required to maintain the same level of occupancy in such multiple-dwelling which existed on September twelfth, nineteen hundred eighty-six and provided, further, that the provisions of this section shall apply to such dwelling on and after the sixtieth day after such application is denied.

§27-2152 Enforcement. a. If the commissioner has reasonable cause to believe that an owner has violated the provisions of section 27-2151, the commissioner shall serve a notice of violation and an order to correct such violation on the owner pursuant to sections 27-2091 and 27-2095 of this code. The order shall require the owner to comply with subdivision a of section 27-2151 in the manner specified in such order within ten days. A copy of the order shall be filed with the city register and any subsequent purchaser of the property shall be subject to such order

b. An owner may apply within the ten day period following

service of the notice and order

1. for the revocation of the notice of violation and order on the ground that the condition alleged to constitute the violation did not exist at the time the violation was placed. The department may grant such revocation upon the presentation of proof satisfactory to the department; or

2. for an extension of the time for correction. The department may, upon good cause shown, including consideration of the complexity of repairs which may be necessary to make the

dwelling unit habitable, grant such extension for such period of time that it deems appropriate.

c. The owner shall certify correction of the violation in accordance with subdivision f of section 27-2115 no later than five days after the date set for corrections. Such certification shall be supported by a sworn statement by the owner that the units which are the subject of notice of violation have been rented to bona fide tenants or that the owner has, in good faith, made a continuing public offer to rent such units at rents no greater than the rents authorized by law. The department may require such additional proof as it deems



necessary, including but not limited to the specific units offered for rent and the rents asked therefor.

d. For the purposes of this section there shall be a rebuttable presumption that an owner has violated the provisions of subdivision a of section 27-5151 if a single room occupancy dwelling unit is not occupied by a bona fide tenant for a period of thirty days or longer.

e. 1. An owner who violates the provisions of subdivision ~~a~~ of section 27-2151 shall be subject to a civil penalty of five hundred dollars for each single room occupancy dwelling unit cited in the notice and order issued pursuant to subdivision a of this



section. In addition, an owner who fails to comply with the order within the time specified in the order or within such further period of time authorized by the department pursuant to subdivision b of this section shall be subject to a civil penalty of two hundred fifty dollars per day for each dwelling unit to be calculated from a date ten days after service of the order to the date of compliance therewith.

2. In addition to the civil penalties provided in paragraph one of this subdivision any owner who willfully makes a false certification that a violation has been corrected shall be subject to a civil penalty of



not less than two hundred fifty dollars nor more than one thousand dollars for each dwelling unit or units which are the subject of the notice of violation. Such owner shall also be guilty of a misdemeanor punishable by a fine of not less than two hundred fifty dollars nor more than one thousand dollars, or by imprisonment up to six months, or by both such fine and imprisonment.

3. Such civil penalties may be recovered by the city in an action in any court of competent jurisdiction. A judgment obtained in such an action shall constitute a lien against the premises with



respect to which the violation occurred from the time of the filing of a notice of pendency in the office of the clerk of the county in which such premises is situated. A notice of pendency may be filed at the time of the commencement of the action at any time before final judgment or order.

f. All civil penalties recovered pursuant to subdivision e of this section shall be paid to the single room occupancy housing development fund company established pursuant to subdivision i of section 27-198.2 of the administrative code.

g. 1. The city may institute an action in a court of competent



jurisdiction for an order requiring the owner to comply with the order to correct or for such other relief as may be appropriate.

2. The city may make application for the appointment of a receiver in accordance with the procedures contained in article six of this subchapter. Any receiver appointed pursuant to this paragraph shall be authorized, in addition to any other powers conferred by law, to effect compliance with the provisions of this article. Any expenditures incurred by the receiver to effect such compliance shall constitute a debt of the owner and a lien upon the building and lot and



upon the rents and income thereof, in accordance with the procedures contained in such article six. The city in its discretion may provide funds to be expended by the receiver, and such funds shall constitute a debt recoverable from the owner in accordance with article eight of this subchapter.

h. In the event of any inconsistency between the provisions of this article and other provisions of this code the provisions of this article shall control.

§6. Paragraph nine of subdivision b of section 27-198 of such code, as added by local law number fifty-nine of nineteen



hundred eighty-five, is amended to read as follows:

(9) The commissioner shall not approve any plans or issue any permits based upon a certification of no harassment issued prior to February second, nineteen hundred eighty-seven, unless the commissioner of housing preservation and development issues a supplemental certification that there is no reasonable cause to believe that there has been harassment at the multiple dwelling during the period of time from the date of the issuance of the original certification of no harassment to the date of the application for such a supplemental certification. If the commissioner of housing preservation and



development finds that there is reasonable cause to believe that harassment has occurred during such period of time he or she shall suspend the original certification of no harassment pursuant to paragraphs two and three of subdivision f of section 27-2093 of the code.

§7. Subdivisions a and c of section 27-198 of the administrative code shall expire and shall have no further force or effect on the fifth anniversary date of the effective date of local law number one of nineteen hundred eighty-seven and on the anniversary date of such local law occurring in every fifth year thereafter unless within the thirty day period prior to such anniversary date a local

law has been enacted based upon a finding that the serious public emergency described in section one of such local law continues to exist.

§8. Any payments made to the low and moderate income housing fund prior to the effective date of this local law shall be transferred to the single room occupancy housing development fund company established pursuant to subdivision i of section 27-198.2 of the administrative code.

§9. If any provision of this local law or its application to any person or circumstance shall be held invalid, the remainder of this local law and the applicability of its provisions to other persons or



circumstances shall not be affected
thereby.

§10. This local law shall take
effect immediately.

Local Law No. 1 of 1987

A LOCAL LAW

To amend the administrative code of the city of New York and local law numbers twenty-two and seventy-three of nineteen hundred eighty-six, in relation to prohibiting the conversion, alteration and demolition of single room occupancy multiple dwellings during a serious public emergency.

Be it enacted by the Council as follows:

Section 1. Declaration of legislative findings and intent. The council finds and declares that a serious public emergency has been



created by the loss of single room occupancy dwelling units housing lower income persons; that the loss of such housing units has caused serious hardship for occupants who have been forced to relocate; that adequate housing resources for such occupants do not currently exist; that there is evidence to conclude that the ordinary operation of the real estate market in the city will result in further reduction of such units and that units which have been lost will not be replaced; that many of the occupants who have been or will be displaced from single room occupancy dwelling units are elderly and infirm persons of low income who are incapable of finding alternative housing accommodations; that a



considerable number of such persons have become part of a growing homeless population and that, absent legislative intervention in this process, others will follow; that legislative intervention is necessary to stem the tide of conversion of single room occupancy multiple dwellings during the serious public emergency described in this local law and to alleviate the adverse impact on the housing supply and on displaced low income persons resulting from the loss of single room occupancy dwelling units through conversion and demolition and that the provisions of this local law are necessary and designed to protect the public health, safety and general welfare.

* * *

NOV 2 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

THE COALITION FOR THE HOMELESS,

Petitioner,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

RICHARD WILKERSON, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

**On Petitions for a Writ of Certiorari
to the New York State Court of Appeals**

**BRIEF IN OPPOSITION OF RESPONDENT
SEAWALL ASSOCIATES**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
-against-
SEAWALL ASSOCIATES, *et al.*,
Petitioners,
Respondents.

THE COALITION FOR THE HOMELESS,
-against-
SEAWALL ASSOCIATES, *et al.*,
Petitioner,
Respondents.

RICHARD WILKERSON, *et al.*,
-against-
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**On Petitions for a Writ of Certiorari
to the New York State Court of Appeals**

**BRIEF IN OPPOSITION OF RESPONDENT
SEAWALL ASSOCIATES**

Respondent Seawall Associates ("Seawall") respectfully
urges that this Court deny the petitions for a writ of certiorari,

seeking review of the opinion of the New York State Court of Appeals.¹

COUNTERSTATEMENT OF THE CASE

Seawall will not respond here to the many misstatements and references to matters *dehors* the record in the descriptions of the case contained in the three petitions, except to note that it takes issue with the petitioners' argumentative presentations of the facts herein. Because the relevant provisions of New York City Local Law 9 of 1987 ("Local Law 9"), which was declared unconstitutional in the judgment sought to be reviewed, as well as the relevant underlying facts of this case, are adequately stated in the published opinions of the Supreme Court, New York County, the Appellate Division and the Court of Appeals, Seawall respectfully refers this Court thereto. *See Seawall Assocs. v. City of N.Y.*, 134 Misc. 2d 187, 189-92 (Sup. Ct. N.Y. Co. 1986) (Saxe, J.) (omitted from the City's Appendix); *Seawall Assocs. v. City of N.Y.*, 138 Misc. 2d 96 (Sup. Ct. N.Y. Co. 1987) (Saxe, J.) (*see* A-166-183); *Seawall Assocs. v. City of N.Y.*, 142 A.D.2d 72 (1st Dep't 1988) (*see* A-109-142); *Seawall Assocs. v. City of N.Y.*, No. 127, slip op. (N.Y. July 6, 1989) (*see* A-2-10).

REASONS WHY THE PETITIONS SHOULD BE DENIED

1. This Court is Without Jurisdiction to Hear This Case

This Court has long recognized that it does not possess jurisdiction to review state court decisions rendered on the basis of independent and adequate state constitutional grounds, even though federal questions may also be involved in the case. *See*

¹ Opinion reprinted in the Appendix to the Petition of the City of New York, *et al.* (the "City's Petition") at page A-1. Parenthetical citations preceded by "A" refer to the Appendix to the City's Petition; those preceded by "R" refer to the first and second volume of the Record on Appeal filed in the Court of Appeals; and those preceded by "SR" refer to the third volume of the Record on Appeal (which had been denominated "Supplemental Record" in the Appellate Division).

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); see also *Harris v. Reed*, ___ U.S. ___, 109 S. Ct. 1038 (1989). As long as the state court has made a "plain statement" indicating that there is an independent and adequate state law ground for its opinion, this Court does not have the power to hear the appeal. Thus, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court declared that, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

In several specific instances, the opinion of the New York State Court of Appeals adequately and independently relied on New York State constitutional requirements, independent of federal constitutional law, in striking down Local Law 9. (See, e.g., A-3, A-5, A-9-10, A-12, A-61-63 (particularly at fn. 15) and A-65-66.) In these circumstances, even if the Court of Appeals' ruling with respect to the federal questions presented were arguably wrong, it would be superfluous, because the same judgment would plainly be rendered by the State court in this case *even if* its view of federal law were to be "corrected" by this Court, thus reducing any review by this Court to "nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Significantly, the Court of Appeals, in footnote 15 of its opinion, underscored the rule that the takings clause of the New York State Constitution need *not* be interpreted in the same manner as this Court has interpreted the federal takings clause—*i.e.*, the protections granted property owners by Article 1, section 7 of the State Constitution may be *broader* than those guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.²

² While states are allowed freedom to adopt and enforce their own constitutions and statutes, this Court has made clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all are entitled. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Thus, the freedom which the states enjoy, and which the New York Court of Appeals could properly have exercised in this

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The Court of Appeals noted, however, that since, in this case, it had expressly and plainly found Local Law 9 to be facially invalid under *both* the federal and the state constitutions, it did "not [need to] decide the extent of which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution." (A-63 fn. 15.) Thus, if this Court were to find that the Court of Appeals misconstrued the federal Constitution, that conclusion would be academic in terms of this case. The Court of Appeals is the final arbiter of the New York State Constitution and there is no suggestion that its interpretation thereof violates the federal Constitution. Therefore, Local Law 9 is invalid as an uncompensated taking under the New York State Constitution, and there is an independent and adequate state ground for the Court of Appeals' decision. Footnote 15 of its opinion is a "plain statement" by the highest state court indicating that there is an independent and adequate state law ground for the decision, thus rendering any differences between the federal and state takings clauses irrelevant in this case. See *Michigan v. Long*, 463 U.S. at 1041.³ As a result, there is no jurisdictional basis for Supreme Court review herein, and the petitions should accordingly be denied.

2. This Court's Prior Decisions Concerning the *Per Se* Physical Taking Doctrine Fully Support the Decision Below

The Court of Appeals' holding that Local Law 9 would result in an invalid physical taking requiring compensation under the Fifth Amendment is *not* contrary to any of the decisions of this

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case if it had found such action to be necessary, is to provide *more* protection under the state constitution than the federal Constitution requires, not less. See *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923); see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

³ The petitioners' attempts to base *their* arguments (that there was *no* adequate and independent state ground) on this *very statement* is most curious indeed. (See City's Petition at 23; Petition of The Coalition for the Homeless (the "Coalition's Petition") at 19-20.)

Court which are pointed to by petitioners. (See City's Petition at 10-14; Coalition's Petition at 22-29, joined in on this point by the Petition of Richard Wilkerson, *et al.* ("Individual Intervenors' Petition") at 20.) As the carefully reasoned discussion (reproduced at A-12 through A-29) in the opinion itself demonstrates, the Court of Appeals properly applied the teachings of this Court's pertinent decisions in determining that a *per se* physical taking existed in this case. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); see also *United States v. Causby*, 328 U.S. 256 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Lynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. 577 (1871); cf. *Bowles v. Willingham*, 321 U.S. 503 (1944). The "conflicts" perceived by petitioners between the above-cited decisions and that of the Court of Appeals in this case are strictly illusory.⁴

Firstly, the City's assertion of "conflict" as to the finding of a physical taking in this case relies primarily on its erroneous belief that so long as a law somehow affects "the landlord-tenant relationship," it is *ipso facto* immune from constitutional just compensation requirements. As the Court of Appeals correctly found, this theory is simply incorrect (see A-23-27). The very purpose of the "rent-up" provisions of Local Law 9 (see A-6-7) is to attempt to *create new* landlord-tenant relationships where none exist. Existing landlord-tenant relationships, on the other hand, are wholly governed by different and independent New York laws—Local Law 9 is an entirely different category of regulation.

⁴ Other cases cited in the petitions are either manifestly inapposite in this regard or are not controlling as binding precedent in this case. Cf., e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed*, 464 U.S. 875 (1983); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

The decisions relied upon by the City are sharply distinguishable from the present case. For example, this Court did *not* subject the rent control law challenged in *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1988), to a takings analysis at all. Rather, the majority merely held in *Pennell* that the ordinance at issue was not facially “irrational” under the “deferential” *due process* standard applicable in that case. *See id.* at 859.⁵ The takings claims asserted in *Pennell* were felt by the majority of this Court to be premature (and were therefore not addressed at all) because, absent enforcement, there was no evidence that the challenged “tenant hardship” clause would ever actually be relied upon to reduce a rent below the figure it would have been set at on the basis of the other six (concededly valid) factors specified in the law.⁶

Similarly, the emergency wartime rent control statute upheld in *Bowles v. Willingham*, 321 U.S. 503 (1944), did *not*, as the City claims, “restrict landlords’ ability to determine whether their residential properties [would] be rented.” (City’s Petition at 11.) That law merely set maximum rents in certain designated “defense rental” areas, and it explicitly provided that it did *not* re-

⁵ It is highly significant that, in *Pennell*, the challenged ordinance *did not* apply, by its own terms, “to the rental of a unit that has been voluntarily vacated” or “that is vacant as a result of eviction for certain specified acts,” 108 S. Ct. at 854 n.2, and thus did not, in any event, share one of the most inherently invasive and confiscatory features of the local law at issue in this case. (*See* A-13-15, A-26.)

⁶ Such a showing was found necessary in that case since, *inter alia*, under the San Jose ordinance, consideration of “tenant hardship” was to result in *permissive*, and not mandatory reductions in rent.

It is worth noting, nevertheless, that the six Justices joining in the *Pennell* majority opinion *explicitly* acknowledged the lack of a substantial causal nexus between the landlord’s actions and the tenant’s hardship (as required to overcome a taking claim under *Nollan*) in that case. *See id.* at 859. Seawall submits that, while the lack of any reasonable causal nexus was found by the majority to be “beside the point” in *Pennell*, for purposes of the deferential “rational relationship” test of due process analysis, it would be *quite* relevant, or even determinative, to any *takings* analysis under the newly applicable stricter test set forth in *Nollan*, in which this Court unequivocally heightened the standard of review. (*See infra* at pp. 24-25.)

quire "any person . . . to offer any accommodations for rent." *Id.* at 517. This stands in "sharp contrast" to Local Law 9, which requires respondents, against their will, to allow new tenants, previously unknown to them, to enter their property and take physical possession of it; thus acquiring possessory interests under other existing state rent control laws which are extraordinarily difficult, if not impossible, to sever and which can protect them indefinitely from eviction. (See A-26.) Any use of the real estate other than as an SRO is effectively forbidden by Local Law 9. In explaining why the law challenged in *Bowles* did *not* effect a "taking" of property, this Court emphasized that "[t]here [was] no requirement that the apartments in question be used for purposes which [brought] them under the Act." *Id.*

Respondents do *not* challenge the constitutionality of emergency rental housing legislation prohibiting the eviction of *tenants-in-possession* whose leaseholds have expired, which was first upheld by this Court in *Block v. Hirsh*, 256 U.S. 135 (1921), and which was *not* questioned by the Court of Appeals in this case. (See A-23-26.) However, the *Block* case and its progeny, relied upon by petitioners, have no bearing on the validity of Local Law 9's distinctly more onerous rent-up and fix-up requirements, which purport to compel Seawall and other owners of buildings containing (or formerly containing) SRO units to render derelict vacant units habitable (at considerable expense), and to accept total strangers as tenants of space which they desire to keep empty (or demolish and replace with other permitted uses). See also *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). (Also relied on in the Coalition's Petition at 31-35.)⁷ The fact is that Local Law 9 is *not*

⁷ Petitioners also repeatedly cite *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed*, 464 U.S. 875 (1983), as being binding precedent of this Court which supports their position. However, *Callahan* is an extremely weak "support" on which to rely, as it was "a case that

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classifiable simply as “landlord-tenant” regulation—indeed, it “adjusts” neither rents nor evictions, nor does it in any manner alter the landlord-tenant relationship under existing laws—and it is also plainly *not* merely a “restriction on use”⁸; but, to the contrary, deprives respondents of *all* use of their property except that imposed upon them, against their will, by the City. Indeed, even the City itself concedes that Local Law 9 “go[es] beyond traditional rent control [regulation].” (City’s Petition at 21.)

Similarly, an entirely novel and utterly unsupported theory is posited by the intervenors-petitioners: that by grafting some undefined “personal privacy of use” requirement onto the Fifth Amendment’s conception of protected “property,” the “right to exclude others” may be made inapplicable to all “rental premises,” and thus, to the case at bar. (See Coalition’s Petition at 22-26, 44.) This proposition cannot withstand even cursory scrutiny. The Coalition (joined by the individual intervenors on this point) tries to “distinguish” such cases as *Nollan*, 483 U.S. at 825; *Kaiser Aetna*, 444 U.S. at 164; and *Loretto*, 458 U.S. at 419, on the ground that they involved “property reserved by [their] owners for personal private use” (Coalition’s Petition at 22) while this case

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ha[d] produced no prevailing written opinion at any level. The trial court published no opinion, the Supreme Court of Massachusetts summarily affirmed the judgment by a tie vote (446 N.E.2d 1060), and [this] Court summarily dismissed a purported appeal for want of a substantial federal question. That scenario creates no persuasive, let alone binding, authority for anything.” *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 112-13, 688 P.2d 894, 905 (1984), *appeal dismissed*, 470 U.S. 1046 (1985) (Mosk, J., dissenting). In any event, the ordinance challenged in *Callahan*, like the other cases relied on by petitioners, only protected certain tenants-in-possession from eviction and did *not* mandate that vacant units be subjected to coerced new tenancies. See *Callahan*, 464 U.S. at 875 (Rehnquist, J., dissenting from dismissal and concluding that the ordinance was a taking without just compensation because it was the equivalent of a “physical occupation” of the landlord’s property); see also *Flynn v. City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981) (same ordinance); *Benson v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

- As is argued in the Coalition’s Petition at 29.

allegedly does not; and it inappropriately analogizes to Congress' right under its commerce power to enact legislation forbidding racial discrimination in places of "public accommodation" (i.e., hotels, restaurants, theaters). *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).⁹

In fact, the Coalition's argument proves too much—it is indeed *because* of the fact that respondents did *not* intend or desire to "open their property to the general public" that such cases as *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Heart of Atlanta Motel, Inc.*, 379 U.S. at 241, are utterly inapposite herein. See *Nollan*, 483 U.S. at 832 n.1 (distinguishing *PruneYard* on the ground, *inter alia*, that "there the owner had already opened his property to the general public").¹⁰ Since, to the con-

⁹ *Heart of Atlanta*, in which this Court rejected a takings challenge to the Civil Rights Act of 1964 by a property owner who *voluntarily* operated a motel on his premises and actively solicited patronage therefor on a national basis but desired to continue to follow "a practice of refusing to rent rooms to Negroes," *id.* at 243, is utterly inapposite in the present context. Among other things, the taking claim in that case (summarily rejected by this Court in one sentence) was *not* treated as a "physical" taking claim at all but rather as a claim that the challenged law would operate as a *regulatory* taking by causing the owner economic loss (which claim was found to be invalid). *Id.* at 260-61. Obviously, if the owner of the Heart of Atlanta Motel had opted to go *out* of the motel business and wished to convert his property to other uses rather than give up his policy of racial discrimination, the Civil Rights Act would not (and could not) have compelled him to continue to rent rooms to *anyone* (and certainly could not retroactively have forced someone to whom he *sold* the property for redevelopment to continue the former use, as does Local Law 9 in this case).

¹⁰ In *PruneYard*, the owner of a 21-acre shopping center visited by 25,000 patrons daily (which included 5 acres of parking and 16 acres containing walkways, plazas, sidewalks and buildings occupied by more than 65 shops, 10 restaurants and a movie theater) sought to prevent the exercise of free speech rights (protected under the California Constitution) to circulate petitions in one of its common areas. 447 U.S. at 77-78. This Court correctly noted that the fundamental test of whether state enforcement of the free speech rights of others effected a "taking" of the shopping center owner's core property right to exclude others "requires an examination of whether the restriction on private property 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 82-83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Because it was clear in that case that the

trary, respondents in this case never intended to “open their property to the general public” but rather, expressly intended to vacate the properties and convert them to other uses (*see* SR-8-9, SR-15), Local Law 9’s destruction of their right to exclude others constitutes a compensable taking.¹¹

Further, this argument ignores the fact that *Loretto itself* was a case involving rental premises (an apartment house), *not* property reserved for Mrs. Loretto’s “personal private use” (and also involved regulation arguably impacting on the “landlord-tenant relationship”). This Court made clear in that case that the physical occupation analysis applies equally to rental property as it does to any other property—observing that there was no reason “why a physical occupation of one type of property but not another type is any less of a physical occupation.” *Loretto*, 458 U.S. at 439. Moreover, it is difficult to see how the *Kaiser Aetna* case, 444 U.S. at 164, involving the development by Kaiser Aetna (a commercial real estate developer, like respondents), as lessee

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owner could adopt “time, place, and manner regulations” that would minimize any interference with its chosen use of the property as a public shopping center, this Court found “nothing to suggest that preventing [the owners] from prohibiting th[at] sort of activity [would] unreasonably impair the value or use of their property as a shopping center.” *Id.* at 83. Thus, under the particular circumstances presented, it held that there had clearly not been an unconstitutional taking in that case, and its decision was limited to the type of shopping center involved in that case. *See id.* at 96 (Powell, J., concurring in part and in the judgment).

¹¹ It must be noted that this argument is, in effect, focusing on a “regulatory taking” analysis of the owners’ “investment-backed expectations” of keeping their property “private” (as opposed to being “open to the public”). Respondents’ reasonable investment-backed expectations when they bought these former SRO properties—that they could *exclude* the general public from their property and convert it to other private uses—are in fact highly relevant to the regulatory taking analysis herein. *See infra* at note 19. However, such an analysis is *inherently inappropriate* in the context of a *per se* taking determination based on a physical occupation, where, this Court has long made clear, the Constitution requires just compensation *regardless* of the trivial size of the “taking,” the state interests involved, or the “reasonableness” of the owner’s expectations of a rate of return on the property. *See Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35).

from the owner, of a 6000-acre residential subdivision, housing approximately 22,000 tenants and including at least 1,500 marina waterfront lot leases, additional non-waterfront lot leases, accommodations for pleasureboat owners who were not residents of the development but who paid fees for boating rights, and an on-site shopping center, *id.* at 167-68, can be construed by petitioners as involving property "reserved by its owners for personal private use."

When Seawall acquired its nearly vacant SRO properties in 1984, at a cost of millions of dollars, it did so with the intention of demolishing the buildings located thereon and erecting a major office tower on the site, in midtown Manhattan. (SR-8-9; see A-208-209.) It was Seawall's intention (and legal right) at the time it acquired the properties to reach arrangements with the few remaining tenants to vacate those units that were still occupied.¹² Instead, Local Law 9 would require that the few currently occupied units, plus the majority of now-vacant rooms, be kept in perpetual SRO occupancy at controlled rents, thus enlisting Seawall, against its will, in a business it had, and still has, no desire to be in. (SR-15.) Certainly, it never intended nor expected to be in the business of providing "public accommodations."

Petitioners further argue that under *Loretto*, 458 U.S. at 419, there is no physical taking resulting from Local Law 9 because "the owners retain the right to choose their tenants." (City's Petition at 12-13.)¹³ This is an utterly meaningless "distinction" under

¹² The record demonstrates that Seawall's purpose in acquiring its SRO properties for demolition and redevelopment was fully consistent with applicable law and supportive of the City's then existing housing policy, which sought to encourage the elimination of SRO housing. (See SR-567-71.)

¹³ The City relies for this proposition on dicta contained in footnote 19 of the *Loretto* opinion, in which this Court noted that "the statute *might* present a different question" if it provided for the landlord's ownership of the cable installation, rather than for its ownership and control by the third-party CATV company. 458 U.S. at 440 n.19 (emphasis added) (see City's Petition at 12; see also Coalition's Petition at 28-29). Significantly, however, the City ignores the

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Loretto, which was properly rejected by the Court of Appeals. (A-26-27.) If Mrs. Loretto had been given complete freedom of choice as to *which* CATV companies could install their cables on her building against her will (rather than having the City decide which company would be granted the exclusive franchise to provide CATV in her neighborhood), the physical occupation resulting from the City's law requiring that she allow their intrusion on her property would clearly have been no less a taking. *See Loretto*, 458 U.S. at 424.

Finally, as to the assertions by petitioners that because Local Law 9 is "temporary in duration," it cannot effect a physical taking (City's Petition at 13-14; *see also* Coalition's Petition at 27-28, 33 n.13, 37 and 44), they are based upon a misinterpretation of long-standing eminent domain law and a blatant denial of the reality of the practical effects of Local Law 9, *in conjunction with other existing New York State laws*, upon respondents. The fact is that the operation of Local Law 9's rent-up provisions would compel Seawall to give up possession of its buildings to strangers (*i.e.*, new tenants) *indefinitely*, and perhaps forever, regardless of the fact that the Local Law purports to require legislative "extension" every five years. Firstly, as has consistently been ignored by petitioners, all new tenants will obtain possessory interests protecting them from eviction (as well as limiting their rents) under existing New York rent control or rent stabilization laws, which are often,

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Court's explanation in that same footnote of *why* the landlord's ownership of the cable might make a difference, *i.e.*, because then, "if the landlord wished to repair, *demolish*, or *construct* in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable." *Id.* (emphasis added). In the present case, by contrast, once *any* new tenant gains occupancy rights, Local Law 9, together with other laws, deprives the owner of the ability to deal with his property as he chooses. The significance placed by the *Loretto* Court on burdens placed by legislation upon a landlord's core property rights to demolish and/or construct buildings on his or her property is clearly relevant in the present case. *See also Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property . . . cannot remotely be described as a "government *benefit*".) (emphasis added).

practically speaking, *impossible* for a landlord to sever once acquired,¹⁴ *even if* the Local Law itself were to expire after five years without renewal. Secondly, in considering the potential life-span of this law, which could be extended every five years upon a finding of "necessity," the New York experience with 46 years of annual renewal of "emergency" rent control laws teaches that this so-called "stop-gap" measure must be deemed to be, essentially, of unlimited duration.¹⁵

3. This Court's Prior Decisions Fully Support the Determination Below That Local Law 9 is Facially Invalid As A Regulatory Taking

Petitioners essentially propose that, under the decisions of this Court, there are *never* appropriate factual settings for the determination of facial regulatory taking claims. (See City's Petition at 14-17; Coalition's Petition at 37-39; Individual Intervenors' Petition at 21-27.) They are plainly wrong. This Court's concern with "ripeness" in certain takings cases, stemming from the general rule that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (citations omitted), is based upon the fact that the federal courts, as courts of limited jurisdiction, must, under the "case or controversy" provision of the federal Constitution, decide only "concrete legal issues, presented in actual cases" where there has been "actual interference" with

¹⁴ Under rent control and rent stabilization laws, the vacating of dwelling units by their occupants usually occurs only through the slow process of attrition by death, changed circumstances causing a willingness to move, or through a negotiated buy-out for significant consideration paid to the tenants.

¹⁵ It should be noted that the suggestion by petitioners that there can be no such thing as a temporary physical taking (see City's Petition at 13-14) is, in any event, manifestly incorrect. See, e.g., *United States v. Pewee Coal*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (all dealing with questions of just compensation for temporary physical takings).

someone's rights. *Beacon Hill Farm Assocs. v. Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1082 (4th Cir. 1989) (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947)). Such "ripeness" concerns are *only* relevant in takings cases which are predicated upon an "as-applied" challenge to legislation. See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87 (1985); *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980). There is no question that this case, by contrast, presented a *facial* challenge to Local Law 9.¹⁶

Indeed, petitioners concede that the only issue properly before the Court of Appeals on this facial takings challenge was "whether the 'mere enactment' of the [regulation] constitute[d] a taking" of respondents' property. *Hodel v. Virginia*, 452 U.S. at 295 (quoting *Agin*, 447 U.S. at 260). (See Coalition's Petition at 38; Individual Intervenors' Petition at 22.) As this Court made clear as long ago as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (relied on by petitioners herein) there is no problem of ripeness implicated by a property owner's failure to seek some allegedly available administrative exemption from a land-use regulation before bringing suit challenging its constitutionality, where the claim asserted is facial—i.e., that "the ordinance of its own force operates greatly to reduce the value of the [plaintiff's] lands and destroy their marketability" or that "the existence and maintenance of the ordinance in effect constitutes a present invasion of [the plaintiff's] property rights and a threat to continue it." *Id.* at 386 (emphasis added).¹⁷ As recently as 1987, this Court has

¹⁶In any event, Article III surely could not be said to have barred, on "ripeness" grounds, the New York State Court of Appeals from determining the facial challenge made to Local Law 9 herein under the state Constitution.

¹⁷It is highly significant to note that, in approving the propriety of facial attacks on land-use restrictions as confiscatory in the *Euclid* case, this Court defined the cause of action in terms of an ordinance's mere existence effectively constituting a present invasion of *the plaintiff's property rights* and operating to greatly reduce the value of *the plaintiff's lands*. *Id.* Clearly, such a plaintiff need *not*, as petitioners urge, prove that the challenged regulation also constitutes a present invasion of the property rights of each and every other landowner who may be

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reaffirmed that, notwithstanding its reluctance to render opinions on the constitutionality of land-use ordinances *as applied*, prior to their actual application to a specific piece of land, *see, e.g., Williamson County*, 473 U.S. at 186-87; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348-49 (1986), a landowner *may* nevertheless properly "mount a facial attack on a land use regulation without first seeking a final determination of how the applied regulation will effect actual use of the property." *Beacon Hill Farm Assocs. v. Loudoun County Bd. of Supervisors*, 875 F.2d at 1084, (citing to *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987)); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 138-39, 423 N.E.2d 320, 326 (1981), *rev'd on other grounds*, 458 U.S. 417 (1982) ("As has long been recognized, administrative remedies provided by a statute need not be exhausted prior to the bringing of an action which challenges the enactment 'in its entirety' as unconstitutional"). (See A-61-63 n.14.)

To the extent that petitioners argue that the facial invalidation of Local Law 9 as an uncompensated regulatory taking was premature because respondents had not applied for "hardship exemption" pursuant to § 27-198.2(d)(4)(b) of the New York City Administrative Code (*see* City's Petition at 27), they also misconstrue the very essence of Seawall's claim asserted below: that the so-called "hardship" provision is itself inherently confiscatory on its face, denying Seawall economically viable use of its land by its

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conceivably affected thereby, and petitioners' reliance for such a proposition on the wholly unrelated case of *United States v. Salerno*, 481 U.S. 739 (1987) (involving a challenge to the federal Bail Reform Act as violative of Eighth Amendment) is misplaced. (See City's Petition at 14, 16; Individual Intervenors' Petition at 22-23.) *See, e.g., Hodel v. Irving*, 481 U.S. 704, 717 n.2 (1987) (statute facially invalid where each of the plaintiff's decedents "lost [a] stick in their bundles of property rights upon the enactment" thereof); *cf. Hodel v. Virginia*, 452 U.S. at 295-96 (facial takings challenge held ripe, but rejected on the merits where plaintiffs failed to identify any tracts of land which they owned which were alleged to be taken by the enactment at issue, and thus did not show required impact on *their own property*).

very terms.¹⁸ The text of the hardship provision may be found in the Appendix at A-275 through A-279. Examination of its terms reveals that the purported "reasonable rate of return" that it allegedly "ensures" (*see* City's Petition at 15; Coalition's Petition at 40-41; Individual Intervenors' Petition at 13) is neither "reasonable" nor "ensured." (*See* A-56-57.) Most critically, it wholly excludes any consideration of the owner's *investment* in the property or its fair market value at the time of purchase. (*See* A-211-215.) In Seawall's case it is clear that its original purchase price is the appropriate measure of the property's value against which the "reasonableness" or "economic viability" of the return allowed by Local Law 9 must be measured. Seawall purchased its properties in October, 1984. At that time, the properties were zoned for commercial use (and still are), and there was no moratorium on demolition or conversion. Thus, Seawall had a *reasonable* investment-backed expectation of its ability to redevelop the properties as of right, which Seawall paid for, and which must rightly be considered.¹⁹ By relying only on their current assessed value as *SROs*

¹⁸ As noted *supra* note 11, the existence of the "hardship" provision is irrelevant for purposes of the physical takings analysis herein. Moreover, as to their belated assertions of the need for further development of the record and the impropriety of the trial court's grant of summary judgment, petitioners are conveniently overlooking the plain fact that summary judgment was only granted by Justice Saxe below *after the City itself* moved therefor in "Action 2" of these consolidated actions (R. 858). It is hornbook law in New York that a motion for summary judgment "searches the record" and invites the court to award summary judgment to a nonmoving party where appropriate. *See, e.g., Lansing Research Corp. v. Sybron Corp.*, 142 A.D.2d 816, 819, 530 N.Y.S.2d 698, 701 (3d Dep't 1988) ("By initially seeking summary judgment, defendant exposed itself to a search of the record (*see*, CPLR 3212[b]; Siegel, NY Prac §282, at 239), and summary judgment could have been granted in favor of plaintiff even in the absence of its cross motion for the same relief.")

¹⁹ This Court has made clear, in *Kaiser Aetna*, 444 U.S. at 175, that cases in which "distinct investment-backed expectations" are defeated by regulation present an especially sensitive category of takings, akin to that of permanent physical occupation. Particularly where a government's regulatory action sharply reverses its prior stance, upon which an owner justifiably relied in investing in some particular advantage that the challenged regulation would eliminate or destroy, this special category of takings analysis is implicated. *Id.* Recently,

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as the benchmark against which the "reasonable rate of return" is to be measured, the value of the hardship exemption is set at a point of absurdity. Thus, under Local Law 9's formulation, as is explained below, an owner could receive a "reasonable" return on the property *valued as an SRO*, but this would still not represent anything even remotely resembling a fair return on his initial investment. (See A-35-36, A-56-57 n.13.) This renders the legislative scheme inherently confiscatory.

The "hardship" provisions purport to give petitioner Commissioner of the City's Department of Housing Preservation and Development ("HPD") the power to entertain and grant applications to reduce in whole or in part the amount of the payment required under the buy-out provisions, or the number of replacement dwelling units required to be provided under the replacement exemption, *but only if* he finds: (i) that the owner cannot make a "reasonable" return unless the property is altered, converted or demolished as prohibited by the Local Law; (ii) that neither the owner nor *any prior owner* intentionally managed the property to impair its ability to earn such a return; and (iii) that the requirement that all SRO units be replaced would substantially impair the feasibility of developing the property for any other use.²⁰ Under this provision, it is apparent that those who

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in its opinion in *Keystone*, 480 U.S. at 470, a *facial* takings challenge, this Court reaffirmed the relevance of this special takings category and made clear that it is *not*, as petitioners urge, applicable solely where regulation is challenged "as applied." *Id.* at 495 (quoting *Kaiser Aetna*, 444 U.S. at 175); see also *id.* at 498; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (engaging in analysis of "interference with reasonable investment-backed expectations" in considering *facial* constitutionality of statute).

²⁰ The New York courts properly accepted Seawall's argument that the "hardship" provision is illusory due to the failure of the City to promulgate any regulations thereunder and the resulting unavailability of defined administrative procedures by which an affected property owner could seek partial or complete exemption from the Local Law's "buy-out" or "replacement" obligations. As an examination of the hardship provision clearly reveals, Local Law 9 itself provides *no* standards or guidelines for the exercise of the Commissioner's

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purchased old buildings in midtown Manhattan for site assemblage and office building construction are automatically excluded from "hardship" exemption, since almost *all* of those buildings were, prior to the passage of the law, operated with a view to permanently vacating the SRO units (in accordance with existing City policy and as the City then encouraged) and thereby "impairing" their usefulness as SROs. (See A-3, SR-567-71.)

The serious problem posed by the foregoing impediment to any "hardship" treatment, however, is dwarfed by the problem of the Local Law's definition of a "reasonable rate of return," which is defined in an inherently confiscatory way. The Court will note that Local Law 9 specifically states that "assessed value" is to be determined *without reference to any possibility of conversion or demolition*.²¹ The Court of Appeals correctly recognized that to calculate a reasonable rate of return on the basis of an assessment that ignores the value of the property based on the as-of-right non-residential use (which the Local Law prohibits), is itself confiscatory.

And further, lest any owner seek a ray of hope in the assessment procedures of the City, in which assessments are systematically revised to reflect the enhanced purchase prices paid by

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discretion thereunder. (See A-53 n.12.) Indeed, there were no regulations at all under Local Law 9 until this case was already on appeal to the Court of Appeals, and the belated regulations that *did* purport to become effective on February 13, 1989, do not contain *any* procedures or guidelines whatsoever for the award of "hardship" relief.

²¹ Local Law 9 provides:

The term "reasonable rate of return" is defined to mean a net annual return of eight and one-half percent of the *assessed value of the subject property without recourse to the alteration, conversion or demolition prohibited by subdivisions a and c of this section*. If [HPD] determines that the assessed value of the subject property has increased as the result of the sale of such property, [HPD] shall disregard the increase in the assessed value resulting from such sale to the extent that [HPD] determines that the amount paid for the property at such sale was in excess of the fair market value of the property on the date of the sale if the property continued to be used for single room occupancy rental housing of the same type and quality after the sale.

(A-277-278) (emphasis added).

— developers for underlying lots, the law states that HPD should disregard any increase in the assessed value resulting from a sale to the extent that it is determined that such increase is attributable to the potential for redevelopment. In such case, the value is to be determined instead as if the property would continue to be used as an SRO.

Since it is undisputed that, in determining hardship, the City intends to use an assessment irrevocably and unalterably fixed and limited to use of the property as rent-regulated SRO housing,²² there would appear to be little doubt that HPD would have ample latitude under the Local Law to value the property low enough so that it would easily earn 8.5% of its "value" as an SRO.²³ Thus, Seawall would be forever condemned to conduct the SRO business. Conceivably, Seawall could sell the properties to a person content to engage in such activity, but such a sale would necessarily bring a price not too different from the value HPD would impose. Thus, the only way out of the municipal servitude improperly imposed by Local Law 9 might be abandonment of ownership or sale at a distressed price representing an insignificant fraction of what Seawall paid for the properties, in expectation of redevelopment, before the law was enacted.²⁴ The

²² For SRO units subject to rent stabilization, the New York City Rent Guidelines Board has awarded average increases for one-year leases of .8% per year over the past five years, while apartment rent increases averaged 5% per year. See N.Y.C. Rent Guidelines Bd. Hotel Orders Nos. 14-18; cf. N.Y.C. Rent Guidelines Bd. Apt. Orders Nos. 16-20.

²³ The City has conceded and acknowledged that real property in New York City is valued, for assessment purposes, at 45% of fair market value. Thus, the 8.5% return supposedly offered to owners is *not* 8.5% of their property's fair market value (as an SRO), but only 8.5% of 45% of fair market value, i.e., 3.825% of market value (as an SRO). (See A-56 n.13.)

²⁴ Moreover, even abandonment would not permit an owner to escape the affirmative obligations of the Local Law, since an owner would be subject to substantial financial penalties for failure to comply. In the case at bar, Seawall would be obligated to pay penalties of almost \$55,000 upon citation, if it fails to fix-up and rent-up its units within 30 days after the effective date of the law, and commencing ten days later, fines of \$27,500 per day could be imposed.

ability to abandon or sell at such a huge loss provides no "cure" for the Local Law's constitutional defects.²⁵

Petitioners rely upon inapposite cases to support their argument that the Court of Appeals' holding that Local Law 9 deprives respondents of economically viable use of their property conflicts with the decisions of this Court. For example, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) are both cases which fall within the long-standing "nuisance exception" to the constitutional just compensation guarantee, and are sharply distinguishable from the case at bar on that basis, since they involved classic and proper exercise of the states' police power to prevent activities that are tantamount to public nuisances.²⁶ Indeed, the nuisance exception was critical in determining the result in the case of *Keystone*, 480 U.S. at 470, as well. (See A-50-51.)

²⁵ As to the alleged "buy-out" and "replacement" exemptions, the Court of Appeals correctly held that since "the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclusion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful." (A-54-55.)

²⁶ It should be noted that petitioners' reliance on such early cases as these and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is simplistic and inappropriate in this context, since, before *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and the rest of the recent line of this Court's takings cases, the concept of determining whether the uses which remained to a property owner were "economically viable" did not yet exist—this concept "wasn't even mentioned by the Court until *Penn Central*." Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 762 (Summer 1988). Because the constitutional test in use prior to that time contained only the single requirement that land-use regulation be enacted for a proper public purpose, rather than including the alternative of deprivation of economically viable use, such early opinions have little value in the current context. *Id.* at 763. See also *Nollan*, 483 U.S. at 834-35 n.3 (noting that *Goldblatt v. Hempstead* is "inconsistent with the formulations of our later cases").

The case most often cited in connection with the nuisance exception is *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the owner of a brewery alleged an unconstitutional taking of his property by an amendment to the state constitution prohibiting the manufacture and sale of intoxicating liquors. This Court held in *Mugler* that, since the distiller's use of his property had been validly declared by the constitutional amendment to be "injurious to the health, morals or safety of the community," no compensable taking resulted from the state's termination of this "noxious use of [his] property, [which] inflict[ed] injury upon the community." *Keystone*, 480 U.S. at 489 (quoting *Mugler*, 123 U.S. at 668-69).²⁷

As this Court explained in *Keystone*, however, this distinct type of state action to abate a public nuisance has a "special status" in takings jurisprudence, which:

. . . can [be] understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 491 n.20.²⁷ The Court was careful to underscore the caveat that "[t]he nuisance exception to the taking guarantee is not co-terminous with the police power itself." *Id.* (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 145 (Rehnquist, J., dissenting)). Rather, it has long been recognized as a "narrow" exception, allowing the government the necessary latitude to prevent "a misuse or illegal use." *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (cited in *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissent)).

²⁷ It must be noted, however, that this Court has *never* indicated that *all use* of an entire property could be prohibited without compensation based upon this theory, but rather, merely that a *particular activity* which constitutes a danger to others, or a "nuisance," may be prohibited.

ing)).²⁸ "It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.'" *Keystone*, 480 U.S. at 512.

Moreover, in contrast to the present case, the petitioners in *Keystone* lost on their facial regulatory taking claim because this Court found that they did not suffer any significant diminution in the value of their properties by reason of the challenged statute—there was simply no indication that the law made it impossible for them to profitably engage in their business or that there was any undue interference with their investment-backed expectations. *Id.* at 492-93. Significantly, this Court emphasized that the *Keystone* petitioners never even *claimed* that their mining operations were rendered unprofitable or commercially impracticable by the challenged law, and that, to the contrary, the record showed that, while the statute required that they leave *less than 2%* of their coal in place, *only 75%* of their underground coal could be profitably mined *in any event*. *Id.* at 495-96. Thus, the *Keystone* majority found no evidence of any material effect on the petitioners' investment-backed expectations, and accordingly held that they had not been denied economically viable use of their properties. *Id.* at 495-96, 499.²⁹

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), was also a distinctly different case than the one at bar. Under the facts in *Penn Central*, this Court held that no taking had occurred by the landmarking of Grand Central Terminal un-

²⁸ By way of illustration, the nuisance exception has been applied to deny compensation for the diminution or destruction of value of such property as hazardous waste operations, brothels, unsafe buildings, fire and health hazards, gambling facilities, and "bawdyhouses." See *Keystone*, 480 U.S. at 492 n.22 (citations omitted). So far as Seawall is aware, real estate development has not yet been legislatively declared an illegal or noxious use.

²⁹ In the words of one commentator, "[i]n *Keystone*, the companies *conceded* that they had been operating profitably for twenty years under the regulations and that no individual mine was rendered unprofitable by the regulation. The High Court was thus unmoved by their asserted plight. . . ." *Berger, supra*, at 738.

der its regulatory taking test, primarily because the owners' existing use of the property was still economically viable (although less profitable than it would have been under their unsuccessful proposal to build a high-rise office building in the air space above the terminal), and the denial of permission by the City to build the office building *did not interfere with the owners' primary expectation of using the land as a railroad terminal*. See *id.* at 136-38. It was highly significant in *Penn Central* that the owners did not dispute the finding that they *could* in fact earn a "reasonable return" on their investment in the Terminal based on the land's existing use. *Id.* at 129 n.26. This distinction is critical to this Court's conclusion in *Penn Central* that the Landmarks Law did not result in a compensable taking, where it "not only permit[ed] but contemplate[d] that appellants [could] continue to use the property precisely as it ha[d] been used for the past 65 years" *Id.* at 136.⁹⁰ Moreover, unlike Local Law 9, the ordinance in *Penn Central* gave the property owners valuable transferable development rights, which they could use on other property or sell to others, in exchange for the development rights it "took" from them. *Id.* at 129.

Finally, the Court of Appeals' holding that the burdens imposed on respondents by Local Law 9 do not substantially advance legitimate state interests was not only consistent with, but was *required by*, this Court's decision in *Nollan*, 483 U.S. at 825.

⁹⁰ In light of the Terminal owners' concession that they were still able to make a reasonable return on their investment in the property, this Court's conclusion that the continuation of their present use left them with an economically viable property made sense in the *Penn Central* context. It does *not* make sense here, on the other hand, to reason, as petitioners do, that respondents have *ipso facto* not been deprived of economic viability because they are free to "continue" to use their properties as SROs, a use chosen and carried out in the past (unprofitably, see R. 708, SR-590) by others, and not, as in *Penn Central*, their own chosen and profitable long-standing use of the property. Furthermore, the Blackburn Report *itself* (the basis for all of Local Law 9's "findings of fact"), found that *SROs are not an economically rational use of valuable land* in midtown Manhattan (R. 732), due to, *inter alia*, City-wide market forces creating a rapid rise in the value of such real estate and making the only economically *rational* uses thereof dependent upon conversion or demolition of these buildings.

Clearly, "*Nollan* calls into question the legal propriety of shifting the burden of the cost of [a needed] public benefit to the 'last guy on the block' with a perceived deep pocket." Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 *Hastings L. J.* 359, 393 (1988).

This Court's opinion in *Nollan* proceeds from a recognition of the constitutional necessity of a substantial cause-and-effect "nexus" between the harmful impacts *created* by the development project being regulated, and the exactions or burdens being imposed thereon by the government regulators. See *Nollan*, 483 U.S. at 836-37.³¹ After *Nollan*, a heightened scrutiny of land use regulation is required, and in order to survive a Fifth Amendment taking challenge, an exaction must be *directly* related to amelioration of the adverse impact of the owner's proposed project and, moreover, "the adverse impact must be such that the regulator could have denied the permit outright." Berger, *supra*, at 751. In the words of the Court of Appeals, under *Nollan*, "the stark alternatives offered [to respondents] by Local Law No. 9—either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units)—amount to just the sort of exaction which could be classified, not as a valid regulation of land use but, 'an out-and-out plan of extortion.' " (A-55-56, quoting *Nollan*, 483 U.S. at 837 (citation omitted).)

Although petitioners attempt to say that respondents' redevelopment of their SRO properties will "cause" homelessness (see, e.g., City's Petition at 17, asserting that the law "alleviat[es] the harm [respondents'] development does to the people of New York City"), it is now clear that simply saying so is not enough to pass constitutional muster. As this Court declared in *Nollan*,

³¹ This theory is further elaborated upon in an extremely pertinent factual context in Justice Scalia's subsequent *Pennell* dissenting opinion. See 108 S. Ct. at 862-64.

"[w]e view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." 483 U.S. at 841. It is plain that the requisite causal nexus is lacking in this case, and that respondents have been unfairly forced to bear public burdens, not of their creation, by Local Law 9.

The City itself acknowledges that the decline in the number of SRO units in New York "may be attributed to previous City policies which reflected the then wide-spread opinion that such units were 'substandard' and resulted in legal restrictions on the development of new SRO units (see Administrative Code § 27-2077)", (R. 177), as well as encouraging the destruction of existing SROs through tax incentives and other means. (See City's Petition at 3.) Indeed, it might well be concluded that respondents can more fairly be said to be *eliminating* a "noxious use" of property by their plans to replace the antiquated and largely uninhabitable former SRO buildings on their properties with modern, useful, commercial and residential developments than they are in any way initiating one.³²

Moreover, contrary to petitioners' assertions, Local Law 9 is *not* necessary to protect any current SRO tenants from homelessness or from harassment. As petitioners are well aware, other New York laws exist to protect tenants against unlawful eviction practices. See *Sadowsky v. City of N.Y.*, 732 F.2d 312 (2d Cir. 1984) (upholding the City's SRO anti-harassment law). Respondents are obligated by existing rent control and rent stabilization laws,

³² The ultimately detrimental effect of the land use policy of Local Law 9 on City welfare is plain: the benefits to the City's real estate tax base which would flow from the hundreds of millions of dollars of commercial and residential redevelopment which Local Law 9 would prevent would clearly seem to outweigh the benefits of the relatively few SRO units preserved by the law. It is respectfully suggested that an alternative program which would permit the development of City real estate to its highest and best use, while earmarking the increased property taxes derived from such improvements for housing the homeless, would surely provide the financial underpinnings for a more rational and comprehensive City housing policy. (See R. 573.)

in the event they seek to vacate their buildings, to negotiate relocation agreements with such tenants (which will involve substantial and profitable compensation to those individuals). Thus, if the goal of Local Law 9 is, as the City claims, to *prevent* current tenants from becoming homeless, no adequate nexus can be shown between its means and its ends.

In addition, to the extent the City's goal is to increase the availability of affordable housing stock, the "logic" underlying Local Law 9 is revealed to be insupportable: if the City exacts so large an amount in exchange for allowing owners to redevelop their properties³³ that the owner cannot afford to pay, new development (including new *residential* development) becomes highly unlikely; and if the owner submits and *makes* the extortionate payment, not only does the City get a windfall, but, if the contemplated development is residential, the cost of available housing in the City will predictably increase.³⁴ On the other hand, to the extent the City's goal is to "preserve" existing SRO units affordable to the indigent population which has historically inhabited such "bottom-rung" housing, Local Law 9 doesn't effectively address that problem *either*—under the law's provisions, respondents could "rent-up" their units to *anyone*³⁵ or they could "replace"

³³ In Seawall's case for example, the cost of "buying-out" its buildings from under the yoke of Local Law 9 (at \$45,000 per unit, see N.Y.C. Admin. Code §§ 27-198.2(d)(4)(a)(i) and 27-198.2(h)) would be approximately \$5 million, an exorbitant amount by any standard. It is worth repeating here that, even with this enormous buy-out, Seawall would still not be free to evict its few current tenants, who are protected from eviction by other laws. Moreover, the exercise of the "option" to "buy-out" could nevertheless leave it in circumstances where such tenants refuse to negotiate relocation agreements, and Seawall is forced to maintain those units in perpetuity.

³⁴ It has been estimated that as much as 30% of the current cost of housing is directly attributable to land-use regulation. See Case & Gale, *Henry George Wouldn't Be Big On Today's Growth Controls*, Wall St. J., Mar. 3, 1988, §1, at 18.

³⁵ The City *itself* acknowledges that "these units will not have to be rented to homeless persons or to individuals of any particular social or economic status." (R. 449; see A-47-48.)

their units with non-SRO housing "affordable" to persons of "moderate" income. (N.Y.C. Admin. Code § 27-198.2(d)(4)(a)(ii); R. 153-54.) If they pay the \$45,000 per unit ransom under the buy-out provisions, the Local Law provides that the City will use these funds "for the preservation . . . of *dwelling units* for persons of low and *moderate income*" (N.Y.C. Admin. Code § 27-198.2(i); R. 156-57) (emphasis added). In sum, the Court of Appeals correctly held that Local Law 9 fails to meet *Nollan's* requirement of a close nexus between the "means" and "ends" of a challenged land-use regulation.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the briefs of co-respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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November 3, 1989

In The
Supreme Court of the
United States

October Term, 1969

Supreme Court, U.
FILED
NOV 3 1969

JOSEPH F. SPANIOLO, JR.
CLERK

THE CITY OF NEW YORK, et al.,
Petitioners.

against

SEAWALL ASSOCIATES, et al.,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

against

SEAWALL ASSOCIATES, et al.,
Respondents.

RICHARD WILKERSON, EDGAR FERRELL,
FRANK ALICIA, TOM WILLIAMS, DANNY
SODRUZZO and NICHOLAS TALLERICO,
Petitioners,

against

SEAWALL ASSOCIATES, et al.,
Respondents.

REPORT ON PETITIONS FOR
WRIT OF HABEAS CORPUS TO THE NEW
JERSEY COURT OF APPEALS

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QUESTION PRESENTED

Whether New York City Local Law No. 9 of 1987 (otherwise known as the "SRO Moratorium"), which compels owners of buildings to rent vacant units to people who have no present possessory or legal interests to the building (thereby depriving owners of their most basic property rights - - the right to possess, use and dispossess of it) constitutes a taking in violation of the Fifth Amendment of the United States Constitution.

IDENTITY OF RESPONDENTS

The following is a list of all the affiliates of Sutton East Associates-86 and The Channel Club:

Sutton East Associates

Sutton East Associates-88

Daed Realty Corporation

150 East 35th Street Associates

Ledemis Realty Corporation

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In The
Supreme Court of the
United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners.

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
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-against-

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RICHARD WILKERSON, EDGAR FERRELL,
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SOGDIUZZO and NICHOLAS TALLERICO,
Petitioners,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR
WRITS OF CERTIORARI TO THE NEW
YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

A. THE NATURE OF LOCAL LAW NO. 9

Single room occupancy ("SRO") residential property in
New York City is subject to rent regulation under the New

York City Rent Control and Stabilization Laws. Under these laws, the owner is not required to rent vacant units. Buildings which become vacant can be demolished, subject to compliance with other State and City laws, and the underlying land may be put to other permitted uses.

The SRO Moratorium Law (Local Law No. 9), which was declared invalid by the New York State Court of Appeals, imposed a unique set of restrictions solely for SRO buildings. Those restrictions may be summarized as follows:

1. No unit is permitted to remain vacant: If, for any reason, a unit ceases to be occupied, it must be re-rented to persons who have no present possessory or legal interests at controlled rents (R. 48)¹

2. Vacant buildings formerly devoted to SRO use may not be demolished or converted to any other use (R. 42 - 43).

3. To obtain a release of a SRO building from the restrictions of Local Law No. 9, the owner must either:

- (a) Pay \$ 45,000.00 per unit to the City (the "buyout" provision) (R. 153 - 155), or

¹ The citations preceded by "A." refer to the Appendix to the Petition for Writ of Certiorari which was submitted by petitioner City of New York.

"R." refers to the pages of the Record on Appeal used at the Appellate Division.

"SR." refers to the Supplemental Record in the Court of Appeals.

(b) Construct or otherwise create replacement housing subject to the same legal requirements (the "replacement" provision) (R. 153 - 155).

The amount of the buyout or the number of replacement units may be reduced if the owner obtains a "hardship" exemption. The exemption applies to an owner who is unable to obtain a net annual return on the building of at least 8 1/2% of the building's value assessed as a SRO residence (R. 155).

In sum, Local Law No. 9 imposes an affirmative mandatory directive to rent all vacant rooms, at controlled rents, to strangers who have no present legal or possessory interest. Once they become tenants, they are then protected from eviction by the New York City Rent Stabilization Law (N.Y.C. Admin. Code § 26-501, *et seq.*) and may stay indefinitely at legally regulated rents. Additionally, Local Law No. 9 requires that respondents Sutton East Associates - 86 and the Channel Club (collectively "Sutton East") be in a business (*i.e.*, renting SRO units) that they are not in and do not wish to be in.

On July 6, 1989, the New York Court of Appeals held that Local Law No. 9 "takes" property without affording owners just compensation, in violation of the New York State Constitution and the United States Constitution.

B. STATEMENT OF FACTS

In January 1985, Sutton East purchased, for substantial consideration, the property and building known as the Gracie Square Hotel (the "Hotel") located at 451 East 86th Street, New York, New York (SR. 340).

In April 1985, Sutton East purchased, again for substantial consideration, a series of parcels adjacent to the Hotel (SR. 340). Sutton East demolished the structures existing on the adjacent parcels and constructed a new residential condominium building (SR. 340). Channel Club is the owner and sponsor of that condominium building which is known as The Channel Club (SR. 339.).

At the time that Sutton East purchased the Hotel, it was operated as a residential hotel containing thirty-one SRO units. At the time that Sutton East purchased the Hotel, many of the units were vacant and had been vacant for as long as several years (SR. 341).

The Hotel is now completely vacant and has been vacant since October, 1986 (which is before Local Law No. 9 was enacted).

The income that Sutton East could derive from the rental of the SRO units in the Hotel would be grossly insufficient to provide Sutton East with an adequate return for the cost of acquisition and cost of maintenance of the Hotel (SR. 341 - 342). Indeed, any economically feasible development of the Hotel would necessitate major renovation or demolition of the building (SR. 341 - 342).

Accordingly, Sutton East never intended to offer the vacant SRO units for occupancy or to continue the tenancy of any persons residing at the Hotel except as required by the then applicable provisions of law (SR. 342).

Rather, Sutton East acquired the Hotel in order to develop the property (SR. 340 - 341). Sutton East did not buy the property so it could build a new luxury high-rise residential condominium building that would be adjacent to a dilapidated SRO. Sutton East also entered into an agreement with Channel Club granting Channel Club a permanent easement permitting Channel Club to incorporate two of the rear units on the first floor of the Hotel into the lobby of the condominium building (SR. 351).

After Sutton East purchased the Hotel, Sutton East entered into written agreements with the remaining eleven tenants occupying the units at the Hotel (SR. 316, 341). In consideration for substantial sums of money, each of the tenants voluntarily vacated and surrendered possession of their units and swore in an affidavit that Sutton East had not harassed the tenants, used force, interrupted or discontinued services or engaged in any other activity that would have the effect of obtaining vacant possession of a unit by anything other than a voluntary surrender of possession (SR. 316, 341).

Moreover, the New York City Department of Housing Preservation and Development issued, on August 25, 1987, a certification pursuant to New York City Administrative Code § 27-198 that there had been no harassment at the Hotel for a prescribed thirty-six month period.

SUMMARY OF REASONS FOR
DENYING THE WRITS

A writ of certiorari should be denied because this Court lacks jurisdiction to review the decision of the New York State Court of Appeals. The decision of the New York State Court of Appeals rests upon an independent and adequate state ground -- namely, the interpretation of the "takings" provision of the New York State Constitution (Article I, Section 7). That section provides that "[p]rivate property shall not be taken for public use without just compensation."

Even if this Court determines that there was no independent and adequate state ground, this Court should nonetheless deny the writs of certiorari because the New York State Court of Appeals determined that Local Law No. 9 did not substantially advance a legitimate state interest. All of the petitioners concede that, under this Court's decisions, a statute does not affect a taking if, *inter alia*, it substantially advances a legitimate state interest. The New York State Court of Appeals made a uniquely state factual determination that the local law did not substantially advance a legitimate state interest. This Court should defer to such a negative finding by a state court.

The writs of certiorari should also be denied because this case does not raise unique questions of law nor is the decision of the Court of Appeals at variance with this Court's decisions. At issue is whether the "anti-warehousing" provision of Local Law No. 9 (*i.e.*, the provision which compels an owner

to rent a vacant unit and thereby create a landlord-tenant relationship with a third-party stranger) constitutes a taking.

The Court of Appeals held that:

"... Local Law No. 9 has effected a *per se* physical taking because it 'interfere[s] so drastically' with the SRO property owners fundamental rights to possess and to exclude." (citations omitted)

(A. 28)

The decision of the Court of Appeals adheres to the consistent line of decisions of this Court which hold that when there is a physical trespass onto, and physical occupation of, private property as a result of government action, there is a "physical" taking.

Petitioner, the Coalition for the Homeless (the "Coalition") is incorrect in asserting that this Court's decisions on physical takings are restricted to real property devoted to personal use. The leading case, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), involved a residential rental building. The case of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) involved the development of a seaside marina for the benefit of thousands of homeowners adjacent to the bay.

Moreover, the Coalition and the municipal petitioners (hereinafter the "City") also incorrectly assert that the Local Law No. 9 is not a taking because it is not "permanent". First, this Court has found non-permanent occupations of property to be a "taking". Second, since any new occupant will be protected

under the local rent stabilization laws, the new occupant will be protected from eviction long after any expiration of Local Law No. 9. Additionally, pursuant to the stabilization laws, the occupant can "pass on" the right of continued occupancy to family members.

Finally, the Coalition and the City are incorrect in asserting that Local Law No. 9 is similar to other "rent regulatory laws" found valid by this Court. Local Law No. 9, unlike any "landlord-tenant" law ever presented before this Court, creates an affirmative obligation by the owner to rent property. In all other cases before this Court, the issue was the validity of laws that affected an existing landlord-tenant relationship.

The New York State Court of Appeals also correctly found that Local Law No. 9 constituted a "regulatory taking". Sutton East respectfully adopts the arguments asserted by its co-respondents in this regard. However, Sutton East adds that the hardship provision under Local Law No. 9 is not, contrary to the assertions of the Coalition and the City, similar to the hardship provision under the New York City Rent Control Law. This is because under the Rent Control Law, there is a hardship if an owner cannot make a net annual return of 8-1/2% of the equalized assessed value.² Under Local Law No.

² "Assessed value" is the value of a parcel of real estate given to it by a local assessor. That value is the sum for which each separately assessed parcel of real estate would sell under ordinary circumstances if it were wholly unimproved; and separately stated, the sum for which the same parcel would sell under ordinary circumstances with the improvements, if any, thereon. N.Y. Real Prop. Tax § 522 (McKinney 1984)

"Equalized assessed value" is the value derived by a formula by which the assessed value is multiplied in order to create uniformity throughout the

9, the hardship standard is 8 - 1/2% of assessed value, assessed as a SRO. The standard under Local Law No. 9 uses an artificially depressed standard which makes it, on its face, virtually impossible for any owner to apply.

counties. Equalized assessed value is ascertained by multiplying the assessed value of the property by the state equalization rates which are the percentage of the full value at which the taxable real property in the municipality has been assessed. N. Y. Real Prop. Tax § 804 (McKinney 1984).

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION BECAUSE OF THE UNIQUE NEW YORK STATE INTERESTS INVOLVED

As noted in the Summary of Argument, there are two New York State interests involved which preclude this Court from taking jurisdiction over this case. First, the decision of the New York State Court of Appeals rested upon an independent and adequate state ground, namely the New York State Constitution. Second, the New York Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. This is a unique state determination to which this Court should defer.

A. The Independent and Adequate State Ground

This Court has long relied upon:

"... the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Tribe, American Constitutional Law (2nd Ed. 1988) at Section 3-24, p. 163, citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court reviewed the principles under which it will determine whether a

state court decision is based upon independent and adequate state grounds, thereby precluding Supreme Court review. The Court held that:

"If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached. In this way, both justice and administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Id. at 1041

The New York State Court of Appeals clearly stated that its decision was based on "bona fide, separate, adequate and independent grounds" from an interpretation of the Federal Constitution. *See, e.g.,* Decision at (A. 635 fn. 15).

Although the New York State Court of Appeals referred to several decisions of this Court, the New York State Court merely relied on those precedents "as it would on the precedents of all other jurisdictions." *Michigan v. Long, supra* at 1041.

Significantly, nowhere in the decision of the New York State Court did it state or imply that the takings clause of the New York State Constitution must be interpreted in the same

manner as the takings clause of the Federal Constitution. Indeed, in footnote 15 at page 27 of the Decision, the New York State Court specifically recognized that the two Constitutions could be interpreted differently on this issue. The New York State Court merely found, however, that the two Constitutions were the same on this specific issue. Thus, the New York State Court did:

"... not [need to] decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution."

Id.

Since the decision of the New York State Court is based upon an independent and adequate non-federal ground, this Court has no jurisdiction.

B. THE DETERMINATION OF STATE INTERESTS

All of the petitioners acknowledge that, under this Court's decisions involving "regulatory" takings, a statute "does not affect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Citing, *Nollan v. California Coastal Commission*, 483 U.S.2d 825, 834 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987). Thus, a statute must meet both tests in order to not constitute a regulatory taking.

The New York State Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. (A. 44)

No one - - including the New York State Court of Appeals, Sutton East and the other respondents - - disputes that "the end sought to be furthered by Local Law No. 9 is of the greatest societal importance - - alleviating the critical problems of homelessness." *Id.*

However, the New York State Court of Appeals determined that the means established by the local law did not advance that interest. (A. 44 - 45)

The determination by New York State's highest court regarding the nexus between the means and end is a unique state law determination to which, upon a negative finding, this Court must defer.

POINT II

LOCAL LAW NO. 9 IS A "PHYSICAL TAKING" OF PROPERTY WITHOUT JUST COMPENSATION

Local Law No. 9 is a "physical" taking because it requires Sutton East to permit third-party strangers to physically intrude upon and occupy its vacant building. Local Law No. 9 imposes an affirmative, mandatory duty to rent. Thus, Sutton East is required to allow strangers, who have no present legal or possessory interest, to physically intrude onto its vacant property and requires Sutton East to be in a business it is not in and does not want to be in.

This affirmative, mandatory directive to rent to third-party strangers is an unconsented to physical intrusion, by government direction, onto a person's property.

The New York State Court of Appeals concluded:

"Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.

Under the traditional conception of property, the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space." (citations omitted)

This Court has consistently held that such physical intrusions onto a person's property is a "taking" which must be compensated under the Fifth Amendment to the United States Constitution.

The bright line test established by this Court is simple: where there is an invasion and occupation of private property, there has been a compensable taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the owner of a residential apartment building was required by state law to allow a cable television company to install cable across the property. Although this Court characterized the intrusion as "minor," (*Id.* at 421), the Court held that the intrusion did constitute a physical occupation of property and thus constituted a taking.

In *Loretto*, this Court stated that:

"... we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."

Id. at 426.

This Court further stated that:

"Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in

the possession of his property."
(emphasis in original)

Id. at 436.

In *Nollan v. California Coastal Commission*, *supra*, the issue was whether a local government could condition the grant of a building permit upon the owner of beach front property agreeing to permit the public to traverse it in order to reach a public beach. This Court, utilizing a "regulatory taking" analysis, ruled that the government could not so condition the grant of a permit. However, before reaching that issue, this Court noted that:

"Had California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach... we have no doubt that there would have been a taking."

107 S. Ct. at 3145

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court found that the government's requirement that a real estate developer give public access to a private pond and marina would "result in an actual physical invasion of the privately owned marina." *Id.* at 176. The Court reasoned that to take away the right to exclude is to take away "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 444 U.S. at 180.

Consistent with these decisions, the New York State Court of Appeals found that Local Law No. 9 was a physical "taking." The Court concluded that:

"Indeed, it is difficult to see how such forced occupancy of one's property could not [constitute a *per se* physical taking]. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far more offensive and invasive than the easements in *Kaiser Aetna* or *Nollan* or the installation of the CATV equipment in *Loretto*." (Citations omitted.)

(A. 21 - 22)

Petitioners incorrectly allege that Local Law No. 9 is no different than other laws which regulate landlord-tenant relationships. In support of this allegation petitioners cite to such cases as *Pennell v. City of San Jose*, 435 U.S. 1 (1988) *Bowels v. Willingham*, 321 U.S. 503 (1944) *Block v. Hirsh*, 256 U.S. 135 (1921), *Callahan v. Fresh Pond Shopping Center Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, and *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), appeal dismissed, 449 U.S. 1119 (1981), 464 U.S. 875 (1983).

However, petitioners fail to focus on the crucial difference which distinguishes these cases: that is, Local Law No. 9 does not regulate an existing landlord-tenant relationship. Instead, it forces the creation of an unwanted landlord-tenant relationship. Regulating an existing relationship which the landlord initially consented to is quite different from foisting upon an owner an unwanted relationship.

The argument advanced by petitioners was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*:

"In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mail boxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." (Emphasis added)

458 U.S. at 440.

The New York State Court of Appeals accepted this Court's analysis in so ruling:

"Those decisions have no bearing on the questions here - - whether forcing plaintiffs to rent their properties to strangers constitutes a physical taking...

The rent control and other landlord-tenant regulations that have been upheld by the Supreme Court and this Court merely involve restrictions imposing upon existing tenancies where the landlords had voluntarily put their properties to use for residential housing.

Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired."

Petitioners, also incorrectly argue that the Court of Appeals' application of the doctrine of physical takings to Local Law No. 9 was unwarranted because Local Law No. 9 purportedly is not permanent. (City's Petition at 13; Coalition Petition at 4 - 5.)

Petitioners fail to acknowledge that, although Local Law No. 9 provides that it may be renewed for five year periods if the New York City Council determines that the emergency which the law purportedly addresses still continues. There is no likelihood that the emergency (housing in New York City) will end in the foreseeable future. The housing emergency in New York has continued since the end of World War II -- more than forty years ago -- and continues today. (Act of March 30, 1946, Ch. 274, 1946 N.Y. Laws 723; Local Emergency Housing Rent Control Act, Ch. 21, 1962 N.Y. Laws 51; Emergency Housing Rent Control-Extension, Ch. 480, 1969 N.Y. Laws 754; Emergency Tenant Protection Act of 1974, Ch. 576, N.Y. Laws 769, Local Law 16 of 1969, Local Law 18 of 1988.)

Thus, it is likely that the "emergency" that is the basis of Local Law No. 9 will last indefinitely. Indeed, the New York State Court of Appeals so found:

"... while not specifically made permanent, Local Law No. 9 is, by its own terms, to remain in effect

indefinitely since its five year terms may be extended for additional terms without limit....

(A. 27 - 38, fnt. 5)

Further, Local Law No. 9 will adversely affect Sutton East's property long after any theoretical nonrenewal. The occupancy of any new tenant at Sutton East's vacant building will be governed by New York's rent stabilization laws. Those laws effectively permit any tenant to occupy Sutton East's property indefinitely (except for certain narrowly defined and applied circumstances). Rent Stabilization Code §§ 2523.5-2524 (codified at N.Y.C.R.R. Tit. 9, Sub. S, Ch. VIII), published separately in McKinney's, Unconsolidated Laws.

Moreover, a tenant may "pass on" the right to occupy his unit to a new tenant under the "Law of Succession" created under the State Regulations. *See*, 9 N.Y.C.R.R. § 2523.5.

Even if the offending law is "temporary," it still constitutes a taking for that limited period of time.

The New York State Court of Appeals stated that:

"... (2) even if Local Law be viewed as a temporary provision, it results in a deprivation of the owner's quintessential rights to possess and exclude and therefore, amounts to a physical taking. Under *First Lutheran Church*, ..., where, as here, the governmental action resulted in a *per se* taking, the offending action constitutes a taking for whatever time period is in effect."

(A. 28, fnt. 5)

Petitioners allege that the Court of Appeals mistakenly interpreted this Court's decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 109 S. Ct. 2378 (1987) as holding that physical takings could be temporary (City's Petition at 13).

The fact that a physical taking could be temporary was already clearly decided by the time *First English Evangelical Lutheran Church, supra*, was decided. In fact, in *First English Evangelical Lutheran Church, supra*, this Court relied on such cases as *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) and *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Each of these cases involved appropriation of private property by the United States for use during World War II. All of these cases unequivocally involved physical takings. Additionally, all of these takings were in fact "temporary." Nonetheless, this Court held that there were takings for which compensation had to be paid.

"Though the takings were in fact 'temporary' [citation omitted] there was no question that compensation would be required for the government's interference with the use of property ..."

107 Sup. Ct. at 2387.

In *First English Evangelical Lutheran Church, supra*, this Court found that there is no constitutional difference between a "temporary physical occupation" for which

compensation must be paid and a "permanent physical occupation:"

"These cases reflect the fact that 'temporary' takings which, as here, deny a land owner all use of his property, are not different in kind from permanent takings, for which the constitution clearly requires compensation." (citations omitted)

107 Sup. Ct. at 2388

Petitioners also allege that Local Law No. 9 does not constitute a physical taking because there is no physical occupation of property. (City's Petition at 14). The mandatory requirement in Local Law No. 9 that an owner allow a third-party stranger to come on to his property and take up habitation is clearly an act of physical occupation. As stated by the Court of Appeals:

"The Law [Local Law No. 9] requires nothing less of the owners than 'to suffer the physical occupation of [their] building[s] by third part[ies].'" (citations omitted)

(A. 28 - 29)

This Court has not held, as asserted by the Coalition, that physical takings are restricted to those laws which effect personal privacy: that is, the property must ~~be~~ devoted to personal use.

The leading case of *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, involved "a five story apartment building." 458 U.S. at 421. The physical occupation there was a small

cable which provided cable television services "to the tenants." *Id.* at 421 - 22. There is no indication that the plaintiff in *Loretto* even occupied any portion of the building at issue.

Kaiser Aetna v. United States, supra, involved a large marina development. The development, which included a large pond, was 6,000 acres. The developer had dredged and filled parts of the pond, erected retaining walls and built bridges within the development to create a marina and increased the depth of the channel so as to accommodate pleasure boats. At the time of trial, the community contained approximately 22,000 persons, 1,500 marina water front lot lessees, 86 nonmarina lot lessees, and 56 nonresident boat owners. *Id.* at 167 - 168.

Certainly, there were no "personal privacy" interests involved in *Kaiser Aetna* as asserted by the Coalition. Nonetheless, this Court found there to be a taking.

Furthermore, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), are not at all relevant to the issue before the Court in this case.

In *Heart of Atlanta, supra*, the issue was whether the government could require a place of public accommodation to not discriminate. *Pruneyard Shopping Center v. Robbins, supra*, involved the issue of whether a shopping center, which had in effect become the "City Square" could prevent its invitees from exercising their First Amendment rights to free speech.

Unlike the Motel in *Heart of Atlanta* and unlike the shopping center in *Pruneyard Shopping Center*, Sutton East's

property is not a place of public accommodation. Rather, it is a private, vacant building.

The "buyout" and replacement provisions of Local Law No. 9 do not cure the taking caused by the law, contrary to the assertion of petitioners.

The argument that a law is not a taking because an owner can "buy out" of it, turns the law of takings on its head. When there is a taking, the government must provide just compensation to the owner, not the other way around. (United States Constitution, Amendment V).

If Sutton East wanted to "buy out" of Local Law No. 9, it would have to pay \$ 1,395,000.00 for the 31 units at its hotel. Requiring a property owner to "buyout" of the law "adds insult to injury" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 436) to the taking committed by the government.

Thus, Local Law No. 9 is a physical taking of property.

POINT III

LOCAL LAW NO. 9 IS A REGULATORY TAKING

In order to avoid needless repetition, Sutton East adopts as its own the arguments advanced by co-respondents regarding the regulatory takings analysis.

Sutton East, however, wishes to show that the hardship provision of Local Law No. 9 does not cure the "regulatory takings" caused by Local Law No. 9.

The Court of Appeals held that even if Local Law No. 9 did not effect a physical taking, it would be facially invalid as a regulatory taking. The Court recognized that government regulation involves the adjustment of rights for the public good and that often such adjustment impairs some potential for the use or economic exploitation of private property.

However, the Court of Appeals recognized that some adjustments of rights may be too excessive. Specifically, the Court held that:

"... the constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (citations omitted)

The Court of Appeals utilized the *Nollan* test in order to determine whether Local Law No. 9 constituted a regulatory taking. The *Nollan* test provides that a regulation of the use of private property will, without more, constitute a taking if:

(1) Either it denies an owner economically viable use of his property,

OR

(2) If it does not substantially advance legitimate State interests.

(A. 30 - 31)

Satisfaction of either requirement is sufficient to invalidate a regulation. The Court of Appeals in applying the *Nollan* test to Local Law No. 9 held that "Local Law. No. 9 fails on both counts." (A. 31 - 32)

Petitioners claim that the hardship provision saves Local Law No. 9 because it was copied from the hardship provision of the rent control laws and those laws have been declared to be constitutional. (City's Petition at 15) However, such is not the case. The SRO hardship provision is entirely different from the rent control hardship provision.

Local Law No. 9 provides for a hardship if an owner cannot make a net annual return of 8 1/2% of the assessed value of the property disregarding any increase in the assessed value resulting from a sale if New York City Department of Housing Preservation determines that the amount paid for the property was in excess of the fair market value of the property

used for SRO purposes. (New York City Administrative Code § 27-198.2(d)(4)(b).)

Under the hardship provision of the rent control regulations (9 N.Y.C.R.R. § 2202.8), an owner can receive an increase in rent if he cannot make an 8 1/2% return on the equalized assessed value. (Section 2202.8(a)(4).)

The difference between the rent control regulations and Local Law No. 9 is that the assessed value of a property as a SRO is significantly lower than the equalized assessed value of that same property.

Thus, where it would be very difficult to make a net annual return of 8 1/2% of the equalized assessed value of a property, it would be almost impossible not to make a net annual return of 8 1/2% of the assessed value of a property as a SRO.

The assessed value of Sutton East's property before its purchase was \$ 165,000. The City undoubtedly will use that assessment as its base for determining whether there is a hardship. (Sutton East disputes that this is the proper base but assumes it for the sake of argument here.) Thus, in order to qualify for a hardship under Local Law No. 9, Sutton East must make a net return of no more than a mere \$ 14,025 (that is, 8 1/2% of \$ 165,000).

However, the current assessed value of the property (based on the 1988-89 assessment) is \$ 600,000. Utilizing the 1988-89 tentative City-wide equalization rate (32.49), the equalized assessed value is \$ 1,842,000. Sutton East must earn

net, more than \$ 156,570 (8 1/2% of the equalized assessed value) before it qualifies for a hardship increase under the rent control regulations.

Thus, as a practical matter, the rent control hardship is more than 10 times the amount of the hardship under Local Law No. 9.

This difference between the two hardship provisions is evident from the chart below:

<u>SRO Moratorium</u>		<u>Rent Control</u>
(Assessed Value as an SRO)		(Equalized Assessed Value)
Valuation	\$ 165,000	\$ 600,000
		(\$600,000 ÷ .3249
		[equalization rate])
		= \$ 1,842,000
8 1/2% of Valuation	\$ 14,025	\$ 156,570

Clearly the two are not the same.

By not using the current equalized assessment, the SRO Moratorium hardship effectively permits only a 2% return on assessed value (\$ 14,025 return on \$ 600,000 assessed value) and less than a 1% return on full equalized value.

Such low returns are no returns and are confiscatory.

In recognition of the multiplicity of briefs to be submitted, Sutton East will not further burden this Court by reiterating those arguments with respect to Local Law No. 9 being unconstitutional as a regulatory taking but instead incorporates those arguments as its own.

CONCLUSION

THE PETITIONS FOR WRITS OF
CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 31, 1989

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners,
vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, *et al.*,
Petitioners,
vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,
vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

**Brief for Respondents 459 West 43rd Street Corp.,
Eastern Pork Products Company and Durst Partners
in Opposition to Petitions for a Writ of Certiorari to
the New York Court of Appeals**

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November 4, 1989



Question Presented for Review

If this Court grants the writs of certiorari sought, the following question will be presented for review.

Is Local Law No. 9 of the Laws of The City of New York, 1987 ("Local Law No. 9") unenforceable as a taking of private property without just compensation in violation of the Constitutions of the United States and of the State of New York to the extent that it mandates owners of buildings containing single room occupancy dwelling units to rehabilitate and rent for an indefinite future period all present and future vacant units within thirty days at governmentally controlled rents unless the owner pays \$45,000 to the City of New York for each such SRO unit it wishes to keep vacant or builds alternative units and delivers them without profit or gain to governmentally designated entities or persons, on the ground that Local Law No. 9:

(a) is a per se violation of the takings clause because it denies the owners "the right to exclude others" from their properties in violation of the principles stated in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), or

(b) otherwise violates "[o]ne of the principal purposes of the Takings Clause [which] is to 'bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as to whole.' " *Nollan v. California Coastal Commission*, 483 U.S. at 835, n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))?

List of Parties

(a) Parties

The parties to the appeal before the Court of Appeals of the State of New York which resulted in the order which is the subject of the petitions for certiorari are: The City of

New York, Edward I. Koch, in his capacity as Mayor of the City of New York, Paul A. Crotty, in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York, Charles Smith, in his capacity as Commissioner of the Department of Buildings of the City of New York, Richard Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo, Nicholas Tallerico and The Coalition for the Homeless, Seawall Associates, 459 West 43rd Street Corp., Eastern Pork Products Company, Durst Partners, Sutton East Associates-86, The Channel Club, Anbe Realty Co., Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade, Rocco Imperial and Testamentum.

**(b) Statement Pursuant to Rule 28.1
of the Rules of this Court**

459 West 43rd Street Corp. is a corporation incorporated under the laws of the State of New York. The shares of 459 West 43rd Street Corp. are not publicly traded and are solely owned by members of the family of the deceased Joseph Durst ("the Durst family"). 459 West 43rd Street Corp. has no affiliates whose shares are not also held entirely by the Durst family and it has no subsidiaries. Eastern Pork Products Company and Durst Partners are both partnerships organized under the laws of the State of New York, the interests in which are entirely owned by members of the Durst family.

Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade and Rocco Imperial were also represented by the attorneys for 459 West 43rd Street Corp., Eastern Pork Products Company and Durst Partners before the Court of Appeals of the State of New York but will not participate in the proceedings before this Court. Jambod Enterprises, Inc., is a corporation incorporated under the laws of the State of New York. To the best of our knowledge and information, it has no subsidiaries, parent companies or affiliates. Mygatt/Perry is a partnership organized under the laws of the State of New York engaged in the practice of architecture.

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THE CITY OF NEW YORK, *et al.*,
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**Brief for Respondents 459 West 43rd Street Corp.,
Eastern Pork Products Company and Durst Partners
in Opposition to Petitions for a Writ of Certiorari to
the New York Court of Appeals**

Introductory Statement

This brief opposes the petitions for a writ of certiorari submitted on behalf of the City of New York, its Mayor, Commissioner of the Department of Housing Preservation and Development, and Commissioner of the Department of Buildings ("the Municipal petition"), The Coalition for the Homeless ("the Coalition petition") and Richard

Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo and Nicholas Talerico ("the MFY petition").

The parties on whose behalf this brief is submitted are 459 West 43rd Street Corp. ("459"), Eastern Pork Products Company ("Eastern") and Durst Partners ("Partners"). The matter which is the subject of the petitions and this brief in opposition is *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989).

Statutes Involved

Local Law No. 9 appears at R 151 *et seq.*¹

Local Law No. 9 was enacted by the City Council of the City of New York on March 5, 1987. That ordinance established restrictions on certain owners of buildings in New York City which contained single room occupancy units. "Single occupancy units" ("SROs") are dwelling units which lack kitchens, bathrooms or both within the unit. The SRO units which are the subject of these restrictions do not include the thousands of such units owned by New York City or by various not-for-profit institutions. Generally, the limitations are only upon those units which are owned by private (*i.e.*, nongovernmental) citizens.

Local Law No. 9 declared it to be both illegal and a criminal act to demolish, alter or convert an SRO unit for a minimum five-year period, with provision for unlimited extensions of that moratorium for additional five-year periods. Under the terms of Local Law No. 9, all SRO units must be rented to tenants within 30 days. All SRO units which are presently vacant must be rehabilitated and made habitable. These too must be rented within 30 days.

¹ References preceded by "R" and "SR" are to the Record and Supplemental Record before the New York Court of Appeals.

All such rentals of SRO units are to be governed by the rent control and stabilization laws applicable in New York City. These laws limit the amounts of rent that can be charged and give each particular tenant the right to continue in possession of the unit indefinitely, without regard to the five-year period of the moratorium or any extension thereof. Failure or refusal of the owner to perform any of the foregoing is punishable by the imposition of substantial fines and criminal prosecution. The civil fines to be imposed are \$500 per SRO unit, commencing ten days after service of a notice of the violation, which penalty continues to accrue on a daily basis until cured. Local Law No. 9 presumes that if a SRO unit remains vacant for 30 days, the owner has violated the law.

If an owner of SRO units desires to use his or her property in any manner other than for SRO units, he or she must pay the City no less than \$45,000 per SRO unit to be freed from the restrictions of Local Law No. 9. Under certain circumstances, the owner may alternatively construct new residential units or buildings in lieu thereof and immediately turn them over to a not-for-profit entity approved by the City. In either event, the owners must relocate their SRO tenants if the tenant is willing to be relocated or if the tenant's consent can be purchased by the owner at whatever price the tenant demands.

Statement of the Case

Eastern, 459 and Partners ("the Durst respondents") are each engaged in the business of acquiring real estate for development and sale. Each Durst respondent owns a building in Manhattan which contains SRO units. 459 owns a building known as the Hotel Diplomat located at 108 West 43rd Street. That property was acquired by an affiliate of the Durst family in 1970. At the time of its acquisition, it was operated as a residential hotel containing 216 units. It continues to be so operated. Of the 216

SRO units in the Hotel Diplomat, (a) 48 units are occupied by tenants covered by New York City's rent stabilization law, (b) two units are occupied by tenants covered by New York City's rent control law, (c) 56 units are occasionally let for transient use and (d) 110 units have long been vacant, uninhabitable and each would cost tens of thousands of dollars per unit to rehabilitate.

In 1986, Eastern purchased real property at 611 Ninth Avenue. Situated thereon is a three-story building which at the time of its acquisition was operated, and continues to be operated, as a multiple dwelling containing 18 SRO units. Eight such units are occupied by tenants protected by New York City's rent stabilization and rent control laws. The remaining ten units are vacant and uninhabitable.

Partners owns property at 147-151 West 43rd Street. The six-story building was acquired more than ten years ago and is entirely vacant.

Each of the foregoing properties was acquired for investment purposes before the enactment of Local Law No. 9. After analyzing the costs of rehabilitation, the likely rents to be earned in the event of the mandatory renovation, the "rent-up" and expenses of operation, it is estimated that the losses to the owners of the Hotel Diplomat would exceed \$754,486 a year. (SR 251-258). With respect to all of the presently vacant units, 611 Ninth Avenue would likewise lose \$61,994 annually on the units which would be the subject of the mandatory renovation and rent-up under Local Law No. 9 (SR 117, 258-261).

The history of SRO housing in New York City and its decline in numbers—a decline previously encouraged by all those who were interested in decent housing—is narrated in the City's own report, which was undisputedly the basis for Local Law No. 9. That report, prepared by Anthony J. Blackburn for the City in 1986, and entitled *Single Room*

Occupancy in New York City ("the Blackburn Report"),² states:

[P]ublic policy has been consistently hostile to single-room occupancy arrangements for almost half a century.

There have been several reasons for the efforts to curb the growth of single-room occupancies. First and foremost is the long-standing commitment of the housing and city planning profession to upgrade the housing stock through restraint on the development of "substandard" housing. The lack of full plumbing facilities within a dwelling unit has always been a key measure of substandardness in housing. Absence of cooking facilities and very small unit sizes also detract from the "quality" of the housing stock as traditionally defined. For very respectable reasons based on the long-standing commitment to the elimination of substandard housing, public policy has traditionally tried to control, and occasionally eliminate, single-room occupancy housing

The sordid conditions of many of the buildings, the outrage of local residents at finding themselves next door to concentrations of social misfits, and the commitment of the housing professionals to standard housing as a matter of principle evoked a forcible reaction from Judah Gribetz, an aide to Mayor Wagner . . . he railed against the SROs:

"The SRO should not be accepted as lawful housing for any segment of our citizenry. No community should equate such housing with the acceptable living standards of the 1960s. We should

² The Blackburn Report is part of the Record on Appeal before the New York Court of Appeals (R 673-808). Citations to the Blackburn Report will be made to the pages of that Record.

seriously consider the possibility of phasing the SRO out of existence by compelling its restoration to apartment use. . . . The SRO is a vestigial remnant of a past generation. Its history and use demonstrate that the time has come for the SRO to be regarded as extinct."

These sentiments found legislative expression in amendments to the Housing Maintenance Code which effectively prohibited further conversion to rooming units and . . . discourage[d] subdivision of buildings into rooming units.³

The Blackburn Report credits the City for the decline in SRO housing:

[T]he City's policy in the 1960s to retire the inventory of single room housing . . . was conspicuously successful. Since no new rooming units could be legally created, it was inevitable that the legal inventory would decline through conversion and abandonment.⁴

The recent decisions of City officials to safeguard single room occupancy housing in New York City are a testament to the indifference of that government to those who would dwell therein. They are also a testament to the local government's determination to avoid the political opprobrium associated with a general tax increase needed to help the impoverished. Justice Holmes has written "that a government ought not to be called 'civilized' if it sacrifices the citizen more than it can help."⁵ Under that test, the government that created Local Law No. 9 is uncivilized, both by reason of its failure to serve the poor as well as its

³ R 685-687.

⁴ R 688.

⁵ O.W. Holmes, *The Common Law*, at 37 (M. Howe ed., 1963).

effort to shift the burdens of housing the impoverished on to the respondents' shoulders.

Local Law No. 9 does not merely regulate relations between tenants and landlords, as do rent control and rent stabilization laws. *Bowles v. Willingham*, 321 U.S. 503 (1944). It also requires owners of SRO units to pay the City for the right to make free use of their properties. It requires owners of buildings containing SRO units to (a) "rent up" any vacant units they may possess ("the rent-up" or "anti-warehousing provisions"); (b) rehabilitate or repair such vacant units; and (c) if the property owner desires to leave the SRO business, or use his property in any other manner whatsoever, he or she must either pay to the City of New York \$45,000 per unit or provide for construction of new dwelling units in lieu thereof. Local Law No. 9 is thus fundamentally different from laws which merely seek to regulate rents or even to make indefinite the terms of residential tenancies.

The effect of the foregoing, particularly the "buy-out" or replacement provisions of Local Law No. 9, is to conscript the owners' properties for use as the City Council wishes, and, in addition, to compel the owners to engage in the SRO business for as long as the City Council so pleases.⁶

If those of the Durst respondents who own the Hotel Diplomat, a large property situated on West 43rd Street, wished to make economic use of this site, whether for residential or office use, they would have to pay the City at least the sum of \$45,000 per unit for each of 216 units, or replace those units in other locations at what is presumably a similar cost. The total amount due from such respondents would be \$9,720,000. If the entire vacant stock of privately owned SRO units in the City (5,200 to 7,000 units) were to

⁶ Section 7 of Local Law No. 9 provides that it is effective for five years and will continue to be effective for additional five-year periods thereafter if the City Council so extends it.

be so "ransomed" by their owners at the \$45,000 per SRO unit "buy-out" price, the City would realize for itself the tidy sum of \$315,000,000!⁷

The paying of such enormous sums to the City would still not supply owners with the key to their freedom. They must obtain possession of their units from the occupants thereof. With respect to the Hotel Diplomat, the Durst respondents would still have to buy out each of the 50 occupants who remain at the hotel, as well as the 166 occupants who would either replace the transient guests in the hotel or fill vacant rooms as a consequence of the mandated "rent-up." These requirements of Local Law No. 9 destroy any possibility of using the Hotel Diplomat in the future as anything other than an SRO hotel.

The Blackburn Report made it clear that City policy should favor requiring the owners of SRO units to so purchase their freedom. With admirable candor, Blackburn wrote:

The only way to secure the long-term availability of single room occupancy housing for low-income persons is to transfer the ownership of those properties from for-profit to non-profit entities and to establish the purposes for which they can be used by deed restrictions or similar devices. . . .

* * *

⁷ Contrast this cumulative cost of "buy-out" with the current financial plight of the SRO owners as described in the Blackburn Report:

The previous owners of single room buildings generally express the view that this form of housing is uneconomic, particularly in the light of rent regulation and the typically low income of tenants. Many of them left the business because of frustrations dealing with tenants who frequently had emotional and psychological problems, were in arrears with the rent and were difficult to evict for nonpayment or general property abuse.

This can only be accomplished by both allowing buildings to be converted to more profitable use at a price which more than adequately compensates the city for the resulting loss of low-income units and/or by transferring ownership to non-profit entities which will operate the properties for the benefit of poor single persons.⁸

Local Law No. 9 is not truly directed at the problems created by the decline in numbers of SRO units. As we have seen, no civilized government official in modern history has ever wished to permit development of such substandard accommodations. The actual problem is the shortage of low and moderate income housing in the City of New York. Local Law No. 9 is intended to extract from the SRO owners substantial cash contributions to build or maintain housing units which hopefully will be affordable to citizens of modest means.

The reality is that Local Law No. 9 places a unique burden on only a small fraction of those owners whose properties are usable as lower income housing units. That burden is placed on them solely because their properties contain what are classified as "single room occupancy dwelling units." The far more numerous owners of properties which are also appropriate for use as "dwelling units for persons of modest incomes," however, are free to develop their properties without restriction. That freedom is the consequence of their having fortuitously not fallen within the SRO classification.

An irony of the situation is that the City of New York is the owner of the greatest number of vacant multiple dwellings in the City, including those containing SRO units. Yet, it has exempted itself from the requirements of Local Law No. 9. In the City's view, what is sauce for the unfortunate privately-owned goose is *not* sauce for the municipally-owned gander.

⁸ R 734, 737.

REASONS FOR DENYING THE WRITS

Introduction

The questions sought to be presented to this Court by the Municipal, Coalition and MFY petitions do not qualify under the rigorous standards of Rule 17.1 for review by this Court. The provisions of Local Law No. 9 are so unusually overreaching that review by this Court thereof would require devotion of substantial judicial and legal energies to consideration of what will ultimately prove to be episodic and fleeting. No other jurisdiction is likely to ever enact such oppressive restrictions on property use. Moreover, the rigorous features of Local Law No. 9 about which the respondents complain and which the New York Court of Appeals found abhorrent are, in major part, a function of the unique nature of New York's particular landlord-tenant and land use laws, not sufficiently national in interest to merit review by this Court.

Two more reasons exist for denying the petitions. The petitioners do not really argue that the highest court of New York State invented or misconceived the constitutional principles on which it based its decision. As we shall see, the Municipal, Coalition and MFY petitions merely contend that those previously enunciated principles were misapplied, a conventional argument invariably asserted by unsuccessful litigants and their counsel.

Finally, even cursory review of the petitions and the case below indicates that, contrary to the assertions of petitioners, the decision which is the subject of these applications was properly decided. It is the petitioners who misstate previous decisions of this Court and are in error, not the highest court of the State of New York which ruled against petitioners.

Before proceeding to the merits of the matter, we wish to take a moment to deplore the unseemly mischaracterizations made in the Coalition and MFY petitions, mischaracterizations which are particularly surprising in view of the

eminence of the advocates whose names appear on the petitions in question. It does little credit to its arguments for the Coalition petition to deprecate respondents as builders of "luxury housing" (Coalition Pet. at 9), suggest (contrary to everything in the record) that respondents have been in any way guilty of "harassment" of others (*id.*) or that they are collectively "a group of real estate developers" (Coalition Pet. at 7), as if respondents were less entitled to constitutional protection for that reason. Even more egregious is the MFY petition which inaccurately and impermissibly calls respondents "commercial real estate developers who wished to demolish or convert their buildings to luxury offices or residences" (MFY Pet. at 5-6), dismisses respondents as mere seekers after "speculative gain" (MFY Pet. at 8) and again falsely suggests that both the Court of Appeals and respondents ignore the rights of poorer citizens "driven out of their homes by absentee corporate owners of multiple dwellings who sought financial gain without considering its human costs" (MFY Pet. at 9).

Such mischaracterizations are inappropriate and reflect badly on the arguments made by those who see fit to pepper their petitions with such offensive materials.

I

The unique nature of both Local Law No. 9 and New York law of land use make this an inappropriate case for review by this Court.

The appeals which the petitioners seek to bring to this Court do not meet the criteria of Rule 17.1 on at least two grounds. First, Local Law No. 9 is so uniquely restrictive and extreme, and is recognized to be so restrictive by the petitioners themselves, that it is doubtful that any other jurisdiction will adopt such laws. "[T]he problem, though intrinsically important . . . [is not] . . . 'beyond the academic or the episodic.'" R. Stern, *Supreme Court Practice*

212 (6th ed. 1986) (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)).

Each of the petitions for certiorari emphasizes in its "Questions Presented," as well as in the body of its arguments for review, that Local Law No. 9 is "emergency" and "temporary" legislation. Each thereby concedes the constitutional dubiousness of such a conscription of property owners into operating such a business under such constraints in ordinary circumstances (Municipal Pet. at 3, 21-22; Coalition Pet. at 6, 31-37; MFY Pet. at 4, 7). By so conceding that Local Law No. 9 is only justifiable as "emergency" or "temporary" legislation, petitioners implicitly admit that it can only be justified if it is seen as transitory. Permanent legislation with provisions such as those of Local Law No. 9 would apparently be unjustifiable, even adopting the views of the petitioners. Why after the highest court of New York has ruled on such ephemeral legislation, devoting substantial judicial energy thereto, should the matter not be allowed to rest? Certainly, this Court should not now devote its scarce resources to further review of such a matter. Enough judicial time has been devoted to resolution of an issue which "though intrinsically important" is also admittedly "episodic." R. Stern, *supra*, at 212.

Furthermore, the decision of the New York Court of Appeals invalidating Local Law No. 9 is based on the peculiarities of New York law. There is little reason for this Court to wrestle with a municipal ordinance, the effect of which is so intertwined with local issues of law and policy.

A basic assumption of the decision of the Court of Appeals in holding Local Law No. 9 to be unconstitutionally oppressive was that under New York law, "development rights" (*i.e.*, the right to erect substantial structures by assembling parcels of land) occupy a key place in the bundle of rights which constitute ownership of real property. Citing its own particular decisions to that effect, the Court of Appeals at 74 N.Y.2d at 109, 544 N.Y.S.2d at 550, 542 N.E.2d

at 1067, found that Local Law No. 9 "totally abrogated" such development rights and that under New York law such rights:

"are an essential component of the value of the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property."

(quoting *Fred W. French Investment Company v. City of New York*, 39 N.Y.2d 587, 597, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976), *cert. denied* and *app. diss.*, 429 U.S. 990 (1976); and citing *Matter of Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700 (1967) and *Foster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893)).

Few, if any, other jurisdictions so prize "development rights" as does New York, which refuses to permit their being disregarded in analyzing the constitutional propriety of local legislation as either a violation of constitutional due process or a wrongful taking. If this Court were to grant certiorari and review all or any of the questions raised in the petitions, it would be necessary, as part of the Court's review, to undertake an analysis of the New York law of development rights and the degree to which it assigns peculiar significance thereto in evaluating the property rights of owners of New York property. Such an analysis is hardly a matter of national interest.

Similarly, the draconian effect of Local Law No. 9 upon the unfortunate property owners who fall within its grasp cannot be understood without reference to the parochial New York laws of rent control and rent stabilization as well as the "temporary emergency" which has justified their continuation for the last half century.⁹ It is that strait-

⁹ *Benson v. Beame*, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), *app. diss.*, 449 U.S. 1119 (1981).

jacketing of rents, unique to New York, and the pretext that such restrictions will only continue until the alleged "emergency" is over, which effectively sentences owners of SRO properties under Local Law No. 9 to a lifetime occupation which they do not wish to undertake and which they cannot avoid in the absence of paying ransom for their properties or abandonment.

In summary, the decision of the New York Court of Appeals setting aside Local Law No. 9 is one which is both profoundly based on local conditions in New York itself and the remarkable features of that ordinance. In either case, it does not present an appropriate occasion for this Court to address the developing law of takings.

Given the details and unusual nature of Local Law No. 9, it may well be that in the efforts to obtain review, its invalidation should be considered along with the caveat that "hard cases often make bad law"—yet a further reason for denying the petitions for certiorari. This Court has often denied certiorari on the theory that definitive decisions on a developing area of law should "await the perspective of time," R. Stern, *supra*, at 214, or the work product of other courts. Such restraint is highly appropriate in dealing with such remarkably constraining legislation as Local Law No. 9. This is particularly so since that Local Law was challenged on grounds that it constitutes an impermissible "taking," an area of constitutional jurisprudence that itself is still developing. See "The Jurisprudence of Takings," 88 Colum. L. Rev. 1581 through 1794 (1988).

II

The petitions for certiorari merely argue that there has been a misapplication of principles established by this Court; such an argument is insufficient reason to grant review and, in any event, there has been no such misapplication presented.

R. Stern, *supra*, writes at page 203:

Lawyers, however, are likely to regard any case that they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below arguably "erroneous." But such a loose reading of the Rule 17.1(c) reference to a decision "in conflict with applicable decisions of this Court" does not satisfy the Court's own understanding of what constitutes a conflict of this nature. To justify a grant of certiorari, the conflict must be truly direct and must be readily apparent from the lower court's rationale or result.

Examination of the petitions confirms that the substance of each petitioner's argument is that, in one way or another, the New York Court of Appeals failed to apply this Court's "takings" opinions as petitioners would like to see those opinions applied and also failed to understand the provisions of Local Law No. 9. For example, the Coalition petition states at pages 30-31:

The court below failed to analyze properly the character of Local Law 9, and it held erroneously that its mere enactment constitutes a regulatory taking because it denies the owners economically viable use of their properties, and does not substantially advance a governmental interest. In reaching such conclusion, the court misread prior decisions of this Court.

The Coalition petition does not contend that the principles of what constitutes a regulatory taking were ignored or erroneously restated by the Court of Appeals, only that they were erroneously applied. The same contentions are made by the Municipal petition. *See, e.g.,* Municipal Pet. at 8, 17.

Ironically, it is petitioners who misapply the principles already established by this Court in "takings" cases in their specious effort to persuade this Court that the decision sought to be reviewed is erroneous.

For example, the Municipal petition at page 13 inaccurately states that, because Local Law No. 9 purports to be a "temporary emergency" measure, it cannot be a "physical taking," describing as "unwarranted" this "expansion" of the holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Presumably, the Municipal petition concedes that there can be a "temporary regulatory taking" after *First English*. No doubt the latter is true; however, the constitutional infirmity of uncompensated-for "temporary physical takings" long predates, and indeed was a basis for, the *First English* decision. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 317-18, citing and discussing as examples of "temporary physical takings," compensable under the Fifth Amendment, *United States v. Dow*, 357 U.S. 17 (1958), *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

The petitions also overlook the gravamen of the constitutional infirmities found by the New York Court of Appeals. Local Law No. 9 singles out a small class of real property owners to meet a particular burden of solving a social problem that is not necessarily related to any problem caused by those owners. Those real property owners are deprived of all development rights to their property, required to spend unanticipated sums to rehabilitate those properties,

and rent them up to tenants who will obtain rights of indefinite duration at limited rents under New York's rent stabilization and control laws. No showing is made that the particular persons who will become occupants of this SRO housing so created by Local Law No. 9 are the class of persons intended to be assisted (*i.e.*, the homeless).¹⁰ Nor are owners of other properties which could be used for solution of these social problems affected; only those who happen to own buildings with SRO units are required to participate in the rehabilitation and rent-up of their buildings and to continue doing so in the future. Owners of other structures equally amenable to low income occupants are unaffected by the ordinance even though there are no doubt hundreds of thousands of such units. In order to avoid this singular ordinance, only SRO owners, no other property owners, must buy freedom either at \$45,000 a unit or build alternative units at their own expense and turn those new units over, with no payment, to the municipality's designees. Otherwise, those SRO owners who "qualify" can obtain their freedom only upon proving that the owner is not earning a "sufficient" rate of return (*i.e.*, an artificially low rate of return on an artificially low assessed value of the property). In that event, the "buy-out" price *under certain circumstances* (not yet the subject of municipal regulations), *may be* reduced at the discretion of the City.

The foregoing insufficiency of relationship between the incidence of the burdens created by Local Law No. 9 with the

¹⁰ At pages 436-37 of the Supplemental Record, the attorneys for the intervenors in this case (here represented by the Coalition and MFY petitions) acknowledged that the rents to be charged for SRO units to occupants who as a consequence of Local Law No. 9 take possession thereof, although regulated, may still be too high for the homeless to pay. Consequently, the only effect Local Law No. 9 may have is to furnish housing to the middle class. Notwithstanding, the attorney justified the ordinance on the "trickle down" theory that if young middle class citizens were tempted to move into SRO units (ignoring the lack of bathrooms and kitchens), New York City's housing crisis might be eased and the impoverished move into what were the units occupied by those younger middle class individuals.

creation of the problem allegedly to be solved and the means to solve it, makes the Local Law a "taking" under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as the Court of Appeals so found. *Seawall Associates v. City of New York*, 74 N.Y.2d at 106, 111, 112, 544 N.Y.S.2d at 548, 551, 552, 542 N.E.2d at 1065, 1068, 1069. Proposed destruction by Local Law No. 9 of two particular strands in the bundle of rights which constitute "property" under New York law—the right to be free of strangers and the right to develop—dictate the finding that Local Law No. 9 is an unjustified "taking" as described in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Loretto v. Teleprompter, Manhattan Cable TV*, 458 U.S. 419 (1982), as also found by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 102, 103, 104, 105, 106, 544 N.Y.S.2d at 546, 547, 548, 542 N.E.2d at 1062, 1063, 1064, 1065.¹¹

Finally, the basic unfairness of placing such a burden on a discrete class of owners, prohibiting them (in the absence of payment of ransom of huge proportions) from using their properties in any way *but the one way the municipal government directs*, violates the balancing approach set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), as also stated by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 108, 111, 112, 544 N.Y.S.2d at 549, 551, 552, 542 N.E.2d at 1066, 1068, 1070. Nor can it be seriously believed that this ordinance is a mere regulation of prices or other economic incidents of rental accommodations, as was accepted in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and as argued in the petitions.

¹¹ The Coalition petition at pages 22-24 makes the peculiar argument that governmental destruction of the right of property owners to exclude others is a "taking" only if "personal privacy" is involved. It thus claims that such a "right" does not exist in favor of commercial owners, landlords and developers. Unaccountably, the Coalition petition cites *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), as authority for that position, overlooking the status of the owner in that case as a developer who successfully complained that its right to exclude the public from its development was being infringed.

Nothing in *Pennell* (or any other case cited by petitioners) even implies that the owners of properties can be so conscripted into such a business with no avenue of escape other than to buy themselves out or abandon their properties.

In short and in conclusion, the New York Court of Appeals has not misapplied any principles or authorities; its decision is one which this Court would, in any event, affirm. It is on this most fundamental level that we oppose the granting of certiorari in this matter. The result reached by the Court of Appeals was the correct result, one which should not be, and which we are confident will not be, disturbed by this Court.

CONCLUSION

The three petitions for certiorari should be denied.

Dated: New York, NY
November 4, 1989

Respectfully submitted,

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No. 89-388

IN THE SUPREME COURT
OF THE UNITED STATES

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

SEAWALL ASSOCIATES, et al.,

Respondents.

REPLY BRIEF

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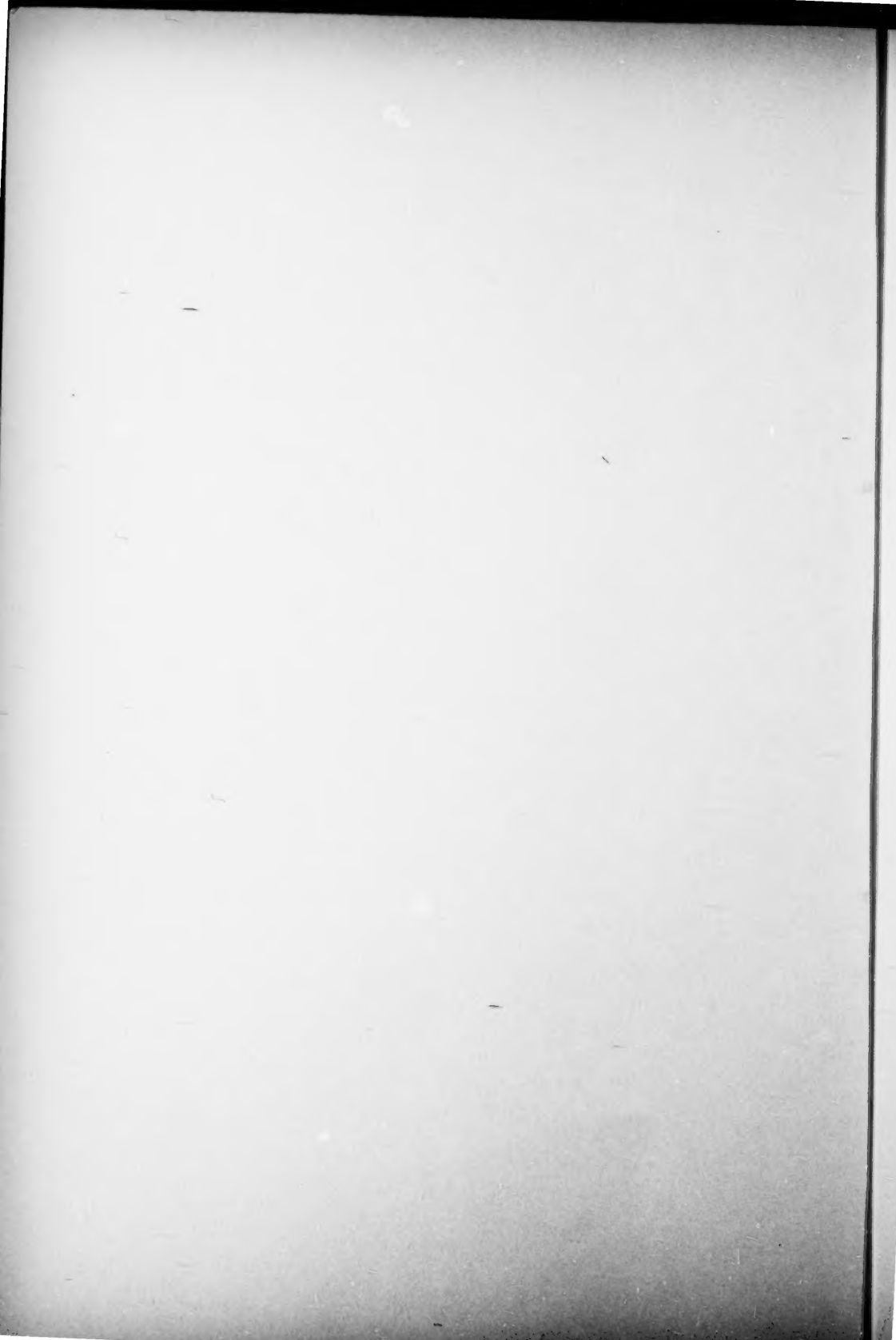


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STATEMENT OF WORK

FOR THE YEAR 1961-1962

CHICAGO, ILLINOIS

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GROUND.

Respondents' categorical statement that the decision below rests on an adequate and independent state law ground is inaccurate. (Seawall Brief at 2-4, Sutton East Brief at 10-12). The decision below explicitly rests on federal law.

The decision constitutes the Court of Appeals' prediction of how this Court would resolve the constitutional issues presented in

THE COURT

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this challenge to New York City's SRO moratorium law. The Court of Appeals stated that it was resting its decision on federal law: "Although the Supreme Court has not passed on the specific issue of whether the loss of possessory interests . . . would constitute a per se taking, we believe that it would." (A-21).

Consistent with the Court of Appeals' reliance on federal law, the decision contains no analysis of the state law of takings. The state constitution is cited only three times and then only in conjunction with the parallel federal constitutional provision (A-3, 12, 63). State cases are cited only three times (A-23, 39, 59). In contrast, the lower court devotes the entire decision to an analysis of the federal cases takings clause with an emphasis on the recent takings decisions by this Court (A-16-29, 29-32, 34-52, 57-63).

Underscoring the lower Court's exclusive reliance on federal law is the fact that the Court withheld a "plain statement" that federal law did not compel its result. See Michigan v. Long, 463 U.S. 1032, 1041 (1983). The Court stated that it was not deciding the question of whether it would reach the same result under state law: "In view of this holding, we need not decide the extent to which, if at all, the protections of the "taking clause" of the New York State Constitution differ from those under the Federal Constitution." (A-63). In these circumstances, this Court has jurisdiction to hear this case and respondents' claim to the contrary is meritless. Asarco, Inc. v. Kadish, 109 S. Ct. 2037, 2049 (1989); Michigan v. Long, 463 U.S. at 1040-41 (1983).

CONCLUSION

**THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE
GRANTED.**

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